$1.00

Current History

A WORLD AFFAIRS MONTHLY JULY, 1971

AMERICAN JUSTICE AT WORK

Current History

FOUNDED IN 1914

JULY, 1971
VOLUME 61 NUMBER 359

Coming Next Month

IMPROVING JUSTICE IN AMERICA

Our August, 1971, issue continues the symposium on justice in the United States with a study of suggested reforms. Articles will discuss:

The Need for Judicial Reform
by STUART S. NAGEL, Yale Law School

Pretrial Crime News: To Curb or Not to Curb?
by JOHN LOFTON, *St. Louis Post Dispatch*

Logjam in the Criminal Courts
by JEAN TAYLOR, Institute for Defense Analysis

Jury System Reform
by ALLAN NANES, Library of Congress

Civil Cases: Delays and Inequities
by MAURICE ROSENBERG, Columbia Law School

The Problem of Military Justice
by EDMUND GANNON, Library of Congress

British, French and U.S. Systems of Justice Compared
by BRADLEY C. CANON, University of Kentucky

Also in this series . . .

THE AMERICAN SYSTEM OF JUSTICE, June, 1971
AMERICAN JUSTICE AT WORK, July, 1971

HIGH SCHOOL DEBATERS: Note these 3 issues on the 1971–1972 N.U.E.A. Debate Topic

Published monthly by Current History, Inc., 4225 Main St., Phila., Pa. 19127. Second Class Postage paid at Phila., Pa., and additional mailing offices. Indexed in *The Reader's Guide to Periodical Literature*. Individual copies may be secured by writing to the publication office. No responsibility is assumed for the return of unsolicited manuscripts.

$1.00 a copy • $9.50 a year • Canada $10.00 a year • Foreign $10.50 a year
Please see back cover for quantity purchase rates.

NO ADVERTISING

Current History

JULY, 1971 VOL. 61, NO. 359

The second issue in our symposium on justice in America describes the way the system works today in the 50 states. As our first article on the judges points out, because it is difficult to evaluate the quality of the judges now serving on the bench in the United States courts at various levels, "Perhaps it is more fruitful . . . to divert attention from the effort to assess the quality of judges to the related but distinct consideration of the quality of justice they dispense."

American Judges: Their Selection, Tenure, Variety and Quality

By Sheldon Goldman

Associate Professor of Government, University of Massachusetts

There are over 5,500 American judges serving on both federal and state trial and appellate courts.[1] They serve in a wide variety of court systems because each state and the federal government has its own set of courts. As can be expected, the rules as well as the politics governing judicial selection and tenure vary widely, and furthermore it is believed that there are diverse groups of judges on the bench both in terms of their political and sociological characteristics and their "quality."

Judicial Selection. There are essentially five methods for selecting judges currently in the United States. They are: partisan election, non-partisan election, merit plan selection, executive appointment and legislative appointment. The *partisan election* method, with its roots in the age of Jacksonian democracy,[2] is still the method most used by the states. Today, fourteen states are committed to it for the selection of most or all their judges. This means that candidates for judicial office run with a party designation (determined by the party primary or convention) and (typically) are legally allowed to conduct a fully partisan campaign. The *nonpartisan election* method, which dates back to the progressive movement at the turn of the century,[3] is also prominent. Thirteen states now use non-partisan elections to select most or all their judges. Under this scheme, judges run for office without a party designation and are usually restricted as to the nature of their campaigning. In sum, then, some form of

[1] For state judges see *The Book of the States 1970–1971*, Vol. 18 (Lexington, Kentucky: Council of State Governments, 1970), p. 121. For federal judges see *United States Government Organizational Manual—1970/71* (Washington, D.C.: Office of the Federal Register, 1970), pp. 44–52.

[2] Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection* (Boston: Boston University Press, 1956), p. 36.

[3] Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan* (New York: Wiley, 1969), p. 3n.

election process, partisan or non-partisan, is found in over half the states.

Merit plan selection (also known as the "Missouri Plan" because it was first adopted there in 1940) is the method most favored by the organized bar and has been the subject of extensive lobbying efforts in recent decades. By 1971, eleven states had legally adopted the plan (eight since 1962) to select most or all judges. In several other states and localities a merit type procedure has been informally utilized by mayors and governors sensitive to the wishes of bar and reform groups.[4] Under merit selection, a nominating commission (usually consisting of lawyers elected by the bar, lay gubernatorial appointees and members of the judiciary) submits to the Governor a panel of judicial nominees (usually three) for a particular judicial post. The Governor must make his appointment from the panel of names presented to him.

The method which relies largely on *executive appointment* is currently in use by eight states and the federal government. As specified in the United States Constitution, the President appoints federal judges with the consent of the Senate. Similarly, in Delaware, Hawaii and New Jersey, the Governor appoints with the consent of the State Senate. In Maine, Massachusetts and New Hampshire, however, the Executive Council must approve gubernatorial appointees, while in California the Commission on Judicial Appointments must give its consent. Only in Maryland does the Governor have an exclusive appointment power; however, his appointees must subsequently run for election.

Judicial *selection by the full legislature* is an anachronism that stems back to the early colonial experience. Only four states place major reliance on this method and in one state, Connecticut, the Governor formally submits nominations.

Table One presents the principal methods of judicial selection and where they are predominantly used. It should be noted that a majority of the states do not select all their judges by any one method. For example, in the state of Iowa, judges of the Supreme and District courts are selected under the merit plan. But municipal court judges are selected in non-partisan elections and justices of the peace run for office in partisan elections. Police court judges are appointed either by the city council or elected by the voters.

JUDICIAL SELECTION IN PRACTICE

To understand judicial selection it is necessary to know not only the formal requirements for selection but also what actually occurs in practice. This requires the investigation of the politics of selection and the determination of the actual process by which those who are judges obtained their jobs. Of course, to understand why one individual and not another seemingly similar person receives a judicial appointment it is necessary to discover the intimate details of all the various transactions that propelled the ultimately successful judicial candidacy. However, on the basis of several studies, it is possible with some degree of confidence to make some broad observations about judicial selection in practice and what appear to be the relevant variables.

Perhaps the most important point worthy of emphasis is that all selection methods involve politics. The partisan and typically the non-partisan election devices concern political party politics often focused at the local party level.[5] The electoral voting patterns of such elections suggest that they are generally consistent with overall partisan trends in the states.[6] In many states which use non-partisan elections, such partisan influences as partisan endorsement of judges and even campaigning with partisan overtones are prominent.[7] However, judicial elections tend

[4] *Ibid.*, pp. 12–13.

[5] See, for example, Wallace W. Sayre and Herbert Kaufman, *Governing New York City: Politics in the Metropolis* (New York: Norton, 1965), pp. 522–557.

[6] Kenneth N. Vines, "Courts as Political and Governmental Agencies," in Herbert Jacob and Kenneth N. Vines (eds.), *Politics in the American States* (Boston: Little, Brown, 1965), pp. 266–267.

[7] *Ibid.*, p. 267. Also see S. Sidney Ulmer, "The Political Party Variable in the Michigan Supreme Court," in Glendon Schubert (ed.), *Judicial Behavior* (Chicago: Rand McNally, 1964), pp. 279–281; David W. Adamany, "The Party Variable in Judges' Voting," *American Political Science Review*, 63 (1969), 62–63, 69–72.

Table One: Principal Methods of Judicial Selection in the United States

Partisan Election	*Non-Partisan Election*	*Legislative Election*	*Executive Appointment*	*Merit Plan*
Alabama[a]	Arizona[a]	Connecticut[a]	California[b]	Alaska
Arkansas	Kentucky[a]	Rhode Island[b]	Delaware	Colorado[a]
Florida	Michigan	South Carolina[c]	Hawaii[b]	Idaho
Georgia[a]	Minnesota	Virginia[a]	Maine[a]	Indiana[b]
Illinois[a]	Montana[a]		Maryland[a]	Iowa[a]
Louisiana	Nevada		Massachusetts	Kansas[b]
Mississippi[a]	North Dakota		New Hampshire	Missouri[a]
New Mexico	Ohio		New Jersey[a]	Nebraska[a]
New York[a,c]	Oregon[a]		United States[a]	Oklahoma[a,c]
North Carolina	South Dakota[a]			Utah[a]
Pennsylvania	Washington[a]			Vermont[a,c]
Tennessee	Wisconsin			
Texas	Wyoming[a]			
West Virginia				

[a] Minor court judges chosen by other methods.
[b] Appellate judges only. Other judges selected by different methods.
[c] Most but not all major judicial positions selected this way.

to be much less competitive than other elections.

Legislative and gubernatorial appointments involve state-wide party politics and gubernatorial politics. Gubernatorial selection of judges often involves many participants (including state legislators, judges, bar association leaders, party leaders, interest group spokesmen) and considerations (legal, political, strategic, policy). It is of interest to note that gubernatorial politics is present in elective systems because a substantial number of judges in elective systems receive gubernatorial interim appointments to fill vacancies created by resignation, retirement, or death.

Merit selection not only has gubernatorial politics built into the system by the provision for gubernatorial appointment, but it also institutionalizes bar association politics by the creation of nomination commissions staffed in part by lawyers elected by the bar. In an extensive study of the merit plan in Missouri, it was discovered that rival bar associations reflecting different socio-economic interests had long contested the elections to the nominating commissions.[8] It was further found that the commissions themselves engaged in extensive internal negotiations and that the panels of names presented to the Governor were often "stacked" to favor a particular nominee. In some instances, the Governor was found to have exerted influence on the selection of names to the panels.[9]

The evidence suggests that all selection methods involve a negotiations process with a variety of participants and interests (although the participants and the importance given to different interests vary with the method). There are a variety of criteria that are used to narrow considerably the population from which the appointee will be chosen. Partisan considerations may considerably reduce that population (note that for the most part judicial positions are filled by those with a background of partisan activism). Bar association activism also appears to be important, particularly in those systems in which the organized bar has established a formal or informal role in the selection process. The legal qualifications of potential candidates may be important especially for the higher and more visible judicial offices (newspaper editors frequently focus on this aspect, often in concert with bar association leaders). The policy or ideological perspectives of the candidates may at times be relevant for selection. Finally, having friends in high places (on the bench, on nominating commissions, in bar

[8] Watson and Downing, *op. cit.*, pp. 20–43.
[9] *Ibid.*, pp. 101–120, 187–194.

associations, in the media, in party organizations, in public office) may be instrumental in securing a judgeship.

FEDERAL JUDICIAL SELECTION

Federal judicial selection is similar in many instances to judicial selection in the states. The negotiations process (particularly for lower federal court positions) is centered in the office of the Deputy Attorney General and includes United States senators and other important party leaders of the President's party from the state "receiving" the appointment and from the American Bar Association's Standing Committee on Federal Judiciary. When the senator from the President's party pushes a candidate not preferred by the Justice Department officials or when the state has two senators of the President's party and they cannot agree on a candidate or candidates or if they and other important party leaders from the state are in wide disagreement, negotiations may continue over many months and possibly beyond a year.[10] Negotiations with the A.B.A. Committee are more subtle. The Committee receives the names of the principal candidates for a position and then investigates and rates them ("Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified"). Occasionally, the committee will vigorously promote a candidacy.[11] In the past, it has fought nominations for those rated "Not Qualified." The Nixon administration, however, agreed not to nominate such candidates; thus the A.B.A. Committee now has a veto power in federal judicial selection.

The considerations that appear to be important for all administrations in deciding whom to nominate include: (1) the legal competence of the candidates; (2) partisan considerations (note that at least 90 per cent of judicial appointments go to members of the President's party); (3) approval of the senator(s) of the President's party from the state of the prospective nominee (without such approval a concerned senator may invoke senatorial courtesy whereby the Senate will ordinarily refuse to confirm); and (4) the ideological or policy positions of the candidates (Democratic administrations have tended to place more political liberals on the bench than political conservatives while Republican administrations have done the reverse).[12] In general, however, political considerations take precedence over the ideological or policy views of the candidates while the latter tend to be more important than the appointment of brilliant legal scholars, or, indeed, those given the highest rating by the A.B.A.

Supreme Court appointments have traditionally been considered the exclusive domain of the President and have been based on a variety of political, personal, or ideological/policy considerations. However, during the nineteenth century and more recently, the Senate has declined to rubber-stamp the President's nominees. After President Richard Nixon's nominations of Clement Haynsworth and Harrold Carswell met defeat, the administration agreed to give the A.B.A. Committee the same opportunity it now has with regard to lower court positions to rate the leading candidates for a Supreme Court nomination and to exercise a virtual veto power. However, it is doubtful that a strong A.B.A. endorsement will result in less senatorial scrutiny of the nominee (note that both Haynsworth and Carswell had received favorable ratings from the A.B.A.).

JUDICIAL TENURE

There are six principal provisions for tenure on the bench in the United States. Four states and the federal government appoint most or all their judges for life tenure.[13] In three states, tenure for most or all judges depends upon reappointment by the Governor with the consent of another body (either the Senate or Executive Council) for terms of office varying from four to twelve years. In

[10] Sheldon Goldman, "Judicial Appointments to the United States Courts of Appeals," *Wisconsin Law Review* (1967), 191–192, 199–200.
[11] *Ibid.*, 193–196.
[12] Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System* (New York: Harper & Row, 1971), pp. 58–59, 60–61.
[13] New Hampshire judges are appointed to age 70; New Jersey superior and appellate court judges are appointed for an initial seven-year term and are eligible for reappointment for life.

twelve states, periodic partisan elections are held with the terms of office varying from two to fourteen years. In fifteen states, nonpartisan elections are held with the term of office varying widely by office and state. In four states, the legislature is responsible for reappointment and in twelve states the tenure provisions of the merit plan are in effect.

Under merit plan tenure provisions, judges, at periodic intervals, run unopposed in nonpartisan retention elections. Nine of the original eleven states which utilize the selection provisions of the merit plan also use the plan's tenure scheme.[14] Illinois and Pennsylvania use partisan elections for selection purposes but use the merit plan for tenure. California (which uses gubernatorial appointment with commission approval for selection purposes) also uses the merit plan's tenure provisions.

In practice, most judges once on the bench stay there at their pleasure regardless of the formal tenure provisions. Most judicial incumbents running for reelection do not face opposition.[15] Generally, those who do are seldom defeated[16] (although there are occasional notable exceptions, for example, in Missouri in the over two decades before the merit plan was adopted, incumbents were beaten at the polls in seven out of twelve partisan elections held for Supreme Court Justice). In states using the merit plan's tenure provisions it is almost (but not quite) a certainty that a judge will win the retention election (in Missouri, for example, in over two decades subsequent to the adoption of the plan only one judge failed in the bid for retention).

It has been extraordinarily difficult to remove judges from office for their unwillingness or inability to perform their duties satisfactorily. This is true not only for judges with life tenure but also for judges with set terms of office. Although the latter, if their offenses are grave enough and public enough, may fail to win reappointment or reelection (or lose a recall election), they and their brethren with life tenure have in the past been disciplined only by the tortuous processes of impeachment and conviction. Only the most serious offenses have triggered such extreme action, and consequently it has occurred infrequently.[17]

In recent years, there has been increasing attention given to the judicial discipline problem and to methods for coping with it. Particularly since the early 1960's, judicial removal commissions have been instituted in many states. By early 1971, at least half the states had some machinery (usually in the form of a commission) with disciplinary and removal powers. The recent District of Columbia crime bill created the first federal judicial removal commission with jurisdiction over the "local" judges (with fixed terms of office) in the District of Columbia. There has also been some movement in the federal judicial circuits to use the circuit councils for disciplinary purposes, and this was given some encouragement when the United States Supreme Court refused to reverse the severe disciplinary steps taken by the Judicial Council of the Tenth Circuit against a federal district judge.[18] However, it is probably too early to assess the impact of all these developments.

VARIETY OF JUDGES

There are a wide variety of social, political, and economic backgrounds represented on the bench, due largely to the multiple levels of judicial office, the varying judicial systems, and the different party systems in the states. Over one-third of all states still have justices of the peace and most of these positions are

---

[14] The other two are accounted for as follows: Vermont uses a legislative vote to determine retention; Utah uses non-partisan elections for retention purposes in which opposing candidates may enter.

[15] Vines, *op. cit.*, pp. 265–266; Sayre and Kaufman, *op. cit.*, p. 534.

[16] Vines, *ibid.*; Watson and Downing, *op. cit.*, pp. 229–230.

[17] See, Joseph Borkin, *The Corrupt Judge* (Cleveland: World Publishing, 1966); Raoul Berger, "Impeachment of Judges and 'Good Behavior' Tenure," *Yale Law Journal*, 79 (1970), 1475–1531; Frank Thompson Jr. and Daniel H. Pollitt, "Impeachment of Federal Judges: An Historical Overview," *North Carolina Law Review*, 49 (1970), 87-121; Charles D. Harris, The Impeachment Trial of Samuel Chase," *American Bar Association Journal*, 57 (1971), 53–57.

[18] *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

low-paying (most rely on a fee basis) and require little or no legal training. Other state positions at the trial level and in local courts of limited jurisdiction are relatively low-paying but can only be filled by lawyers. The lawyers attracted to these positions tend to be from the lower (but far from the lowest) end of the socio-economic continuum.[19] The pool of candidates for the higher-paying and more prestigious state appellate court positions and particularly the handsomely paid lifetime tenured federal judgeships is undoubtedly distinctly different. These judges, especially at the highest state court level and the federal level, tend to come from the middle class or above, tend to have had a good undergraduate and legal education, and tend to have achieved some distinction in their main occupation before ascending the bench (law practice, elective or appointed public office or, in some cases, a lower court judgeship). Like the large majority of judges at all levels, they also tend to have a background of partisan activism.

Over the years, the party balance on the bench has not diverged radically from the partisan make-up of the states, although there are sometimes pronounced short-term discrepancies caused by the relatively lengthy terms of judicial office, notably at the highest levels. At the federal level, most new administrations in recent decades have had the opportunity to fill large numbers of federal judgeships, because of the continued expansion of the number of judicial positions in the federal system.

There is little doubt that black Americans and women are severely underrepresented at all levels of the judiciary. At the higher levels, particularly the federal level, those of minority religious and white ethnic affiliation and those from a lower status socio-economic background are underrepresented in terms of their make-up in the population as a whole. However, at least on the federal level, there is evidence that there are some differences in the backgrounds of judicial appointees of Democratic administrations as compared to Republican administrations. Democratic (in contrast to Republican) administrations tend to appoint proportionately more black Americans as well as those of other minority ethnic and religious affiliation, those of lower status religious affiliation, those from lower socio-economic backgrounds and those from the smaller law firms.

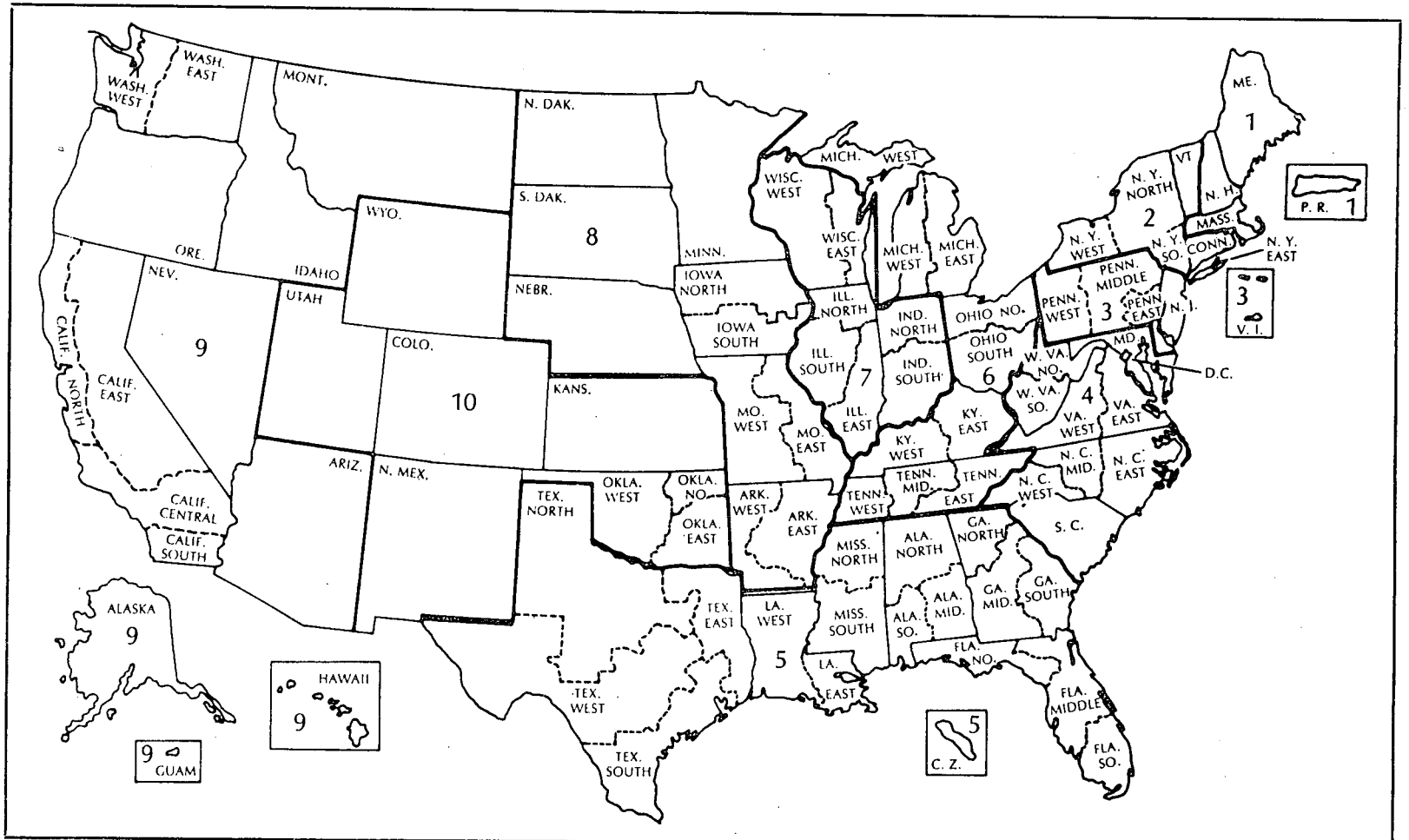
On the state level, there appear to be some differences in the social and political backgrounds of those selected according to the type of selection process utilized.[20] For example, there is a marked pattern of localism in the attribute profiles of judges selected by partisan elections as compared to judges selected by other methods. However, there is little evidence that any one selection system rather than another will necessarily result in the selection of predominantly one social class.[21]

QUALITY

The Chairman of the Oklahoma Judicial Nominating Commission wrote in a recent article: "[O]ur biggest problem has been . . . a lack of qualified candidates. Too many of the men interested in being appointed a judge are either too young and inexperienced, too old, or have not been successful in their own law practice."[22] A distinguished law professor, Philip B. Kurland, lamented about the scarcity of judges with real talent and he asserted: "[t]here is a crisis of confidence in American law and the American judiciary. . . ." He suggested that "[i]f we do not provide the necessary quality of judicial officials" society will come apart, and he added, "It may already be too late."[23] A committee of the North American Judge's Association recently observed, "It is evident the qualities of decision, composure and compassion which make good judges are not easily found nor easily recognized in advance"[24]—a conclusion

[19] See, for example, Watson and Downing, *op. cit.*, p. 73.
[20] Vines, *op. cit.*, pp. 261–262; Herbert Jacob, "The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges," *Journal of Public Law*, 13 (1964), 104–119.
[21] Watson and Downing, *op. cit.*, pp. 343–344.
[22] Lowe Runkle, "The Judicial Nominating Commission," *Judicature*, 54 (1970), 117.
[23] Philip B. Kurland, "The Judicial Process," *The New York Times*, December 12, 1970, p. 31.
[24] As reported in *Judicature*, 54 (1971), 348.

District and Appeals Courts' Boundaries in the United States



Key: The large numerals indicate the various courts of appeals and heavy lines represent the jurisdictional boundaries of each circuit. The broken lines represent jurisdictional boundaries of district courts in states having more than one district.

. . . Taken from the *U.S. Task Force Report of the President's Commission on Law Enforcement and the Administration of Justice: The Courts* (Washington, D.C.: U.S. Government Printing Office, 1968).

reached some years earlier by the noted Chief Justice of the New Jersey Supreme Court after extensively reviewing in the abstract the attributes of a good judge (he noted "the difficulties of measuring judicial attributes objectively").[25]

These statements about the quality of American judges represent the type of arguments that have continued over many years. It is a rare participant in the debate who will not assert the importance of having good judges on the bench. The problems, of course, are how one defines and measures "goodness" and furthermore the discovery (if that is possible) of objective attributes that will enable the selection of persons who will be "good" judges. Complicating matters is that people often have honest differences in their appraisals of others as well as in their personal value hierarchies. Nominating commissions (and bar associations as well) believe that there are criteria associated with being qualified for a judgeship (for example, the Oklahoma commission chairman cited earlier suggested that sex, age, experience and success in law practice are such criteria). Surveys of lawyers and judges as to what they regard as the qualities of superior judges indicate such attributes as common sense, knowledge of the law, courtesy, open-mindedness, and hard work.[26] Furthermore, some surveys of lawyers reveal a preference for merit plan selection on the ground that better quality judges are then chosen.[27] But the connection between the qualities of superior judges and the criteria that are currently used by nominating commissions and bar groups as well as the connection with the selection system used are simply not clear-cut. One is led to the conclusion reached some years ago by a student of the subject, Rodney Mott, who noted: "We may not be able to measure the goodness of a judge, but it is very possible to measure the extent he is thought to be good."[28]

If this, then, is our point of departure for investigating the quality of American judges, we must decide whose opinion to examine. If it is the organized bar's views we investigate (assuming we can find a predominance of bar opinion) we are likely to find a paradox. Members of the bar individually and collectively may decry in general the scarcity of high quality judges on the bench and even attribute this to the partisan aspects of selection, but when it comes down to specifics, they endorse and give good ratings to these very same judges. By the professed standards of the A.B.A. Standing Committee on Federal Judiciary, the federal judiciary is almost entirely dominated by judges who have received "qualified" or better ratings. On the state level, it is rare for a bar association to oppose the reelection or retention of an incumbent judge. The latter, however, may simply reflect the reluctance of lawyers to challenge the judges before whom they practice.

Public opinion surveys have tended to focus on public views of court decisions. For example, in a recent poll, close to three out of four surveyed thought the courts too lenient towards criminal defendants.[29] Such a find-

(Continued on page 50)

[25] Vanderbilt, *op. cit.*, p. 32.
[26] Watson and Downing, *op. cit.*, pp. 296–297.
[27] *Ibid.*, p. 345. Also see Charles H. Sheldon, "The Degree of Satisfaction with State Judicial Selection Systems: Lawyers vs Judges," *Judicature*, 54 (1971), 331–334. Note that the recent National Conference on the Judiciary in which numerous judges, lawyers, and bar association leaders participated recommended that "all state court judges should be appointed to long terms by a nonpartisan commission rather than elected." *The New York Times*, March 15, 1971, p. 27.
[28] As quoted in Watson and Downing, *op. cit.*, p. 273n.
[29] *Newsweek*, March 8, 1971, p. 39.

Sheldon Goldman is the author of numerous political science and law journal articles on selected aspects of the judicial process and judicial behavior. He is also the author of *Roll Call Behavior In The Massachusetts House Of Representatives: A Test Of Selected Hypotheses* (Amherst, Mass.: Bureau of Government Research, University of Massachusetts, 1968), and the coauthor (with Thomas P. Jahnige) of both *The Federal Judicial System: Readings In Process And Behavior* (New York: Holt, Rinehart and Winston, 1968) and *The Federal Courts As A Political System* (New York: Harper and Row, 1971).

"The entire criminal justice process, at the federal, state and local level, from police through prosecutors, courts and corrections, claims an annual expenditure of less than five billion dollars. We spend close to that amount each year on outer space alone. The system is seriously underfinanced; the number of lawyers necessary to run the system adequately is far too meager; the quality of the lawyer manpower in the system is substantially below the equivalent manpower in the civil law system."

Lawyer Manpower in the Criminal Justice System

By Jack Ladinsky
Associate Professor of Sociology, University of Wisconsin

Legal manpower is the most critical ingredient in the operation of the criminal justice system. The significant issues are twofold: how much lawyer manpower do we allocate to the system, and what are the attributes of this manpower?

In 1966, the last year for which data are available, there were close to 302,000 employed lawyers in the United States. These data are tabulated for the American Bar Foundation every three years by Martindale-Hubble, Inc., from information obtained for its annual *Law Directory*.[1] The 1966 total represents an increase in employed lawyers of six and one-half per cent over the previous report in 1963. Since 1954, the triennial increase has ranged from three and one-half to eight and one-half per cent.

There has been a percentage change over an 18-year period, since 1948, in the national distribution of lawyers to work settings. Three significant trends are visible in these figures. First, there is a persistent decline in the percentage of lawyers in private practice, from 85 per cent in 1948 to 74 per cent in 1960. Second, within private practice the loss is entirely in the percentage of individual practitioners, which fell from 58 per cent in 1948 to 40 per cent in 1966. Partners and associates, the two lawyer classifications in law firms, increased modestly but consistently over the 18-year period. Partners increased the most, from a low of 22 per cent in 1966; but associates also increased, from four per cent of all attorneys in 1948 to seven per cent in 1966. Third, there has been a gradual but substantial reallocation of lawyers from private practice to salaried work, primarily in the business sector, but also in government. Private salaried positions increased from a mere three per cent in 1948 to 11 per cent in 1966, with most of the increase in business and industrial employment. Public employment rose from 12 per cent in 1948 to 14 per cent in 1966. All of this modest increase is accounted for by growth in employment at the federal level. Over the years the judges have stayed steady at three per cent, and state and local employment stayed steady at five per cent.

LAWYER MANPOWER IN THE CRIMINAL JUSTICE SYSTEM

How much of this manpower enters into criminal justice proceedings? How competent is it? And is it enough? Before attempting to answer these questions, let us briefly

[1] Fred B. Weil, *The 1967 Lawyer Statistical Report* (Chicago: American Bar Foundation, 1968), pp. 11 and 19.

describe the criminal justice process and the component parts of the criminal justice system.

The criminal justice process. The average American probably holds a simple, idealized view of criminal justice in his community. This idealized view might be called the "full enforcement" model. Under it, the police apprehend suspects whose cases are brought to trial. The community allocates resources sufficient to apprehend, convict and treat violators while protecting the rights of all the accused and the innocence of the falsely accused. But clearly the process is not that simple. The full enforcement model never did and probably never could operate in the real world.

First, most cases initiated by the police are processed outside the courts. The police or the district attorney or a judge may decide not to charge a suspect. Between one-third and one-half of all cases initiated by the police are dismissed somewhere along the way.[2] Second, if the decision is made to prosecute, there is a very high chance, around 90 per cent,[3] that a guilty plea will be obtained from the accused. Each year in this nation over 300,000 felony convictions alone are started.[4] Lesser crimes, misdemeanors other than traffic offenses, number in the millions—five million a year to be more exact,[5] and there are another 600,000 cases involving children who appear in juvenile courts.[6] It would obviously be an impossible burden on the courts if all these cases went to trial. Abraham Blumberg found that in the major American court system he studied, over a 14-year-period between 91 and 95 per cent of the cases pleaded guilty, and as a consequence only from two to four per cent were disposed of by trial.[7]

Third, a very large proportion of the guilty pleas are the result of negotiations between the accused or his attorney and the prosecutor. "Plea bargaining" is a widespread phenomenon, wherein the accused pleads guilty in exchange for a reduced charge and perhaps a recommendation to the judge for a lenient sentence. It has been estimated that between 30 and 40 per cent of all guilty pleas are negotiated.[8] Plea bargaining is both good and evil. On the one hand, because it is an informal process and is carried on out of the court, certain inducements to the accused are often present, and it is open to undue pressure and even corruption. This is particularly true for the innocent caught in the system. It obviously works to the advantage of the guilty. On the other hand, reducing charges can be a form of justice not otherwise obtainable under the law. It can allow for exceptional circumstances, compromises, and a certain amount of clemency to avoid the undesirable limitations of the system and to moderate the impersonal severity of the criminal code.[9]

In short, the full enforcement model is an overly simplified view of criminal justice. As we shall see, there are rarely enough resources for its operation. Secondly, even if there were, there would still be questions as to whether all conduct forbidden by law should or could be prosecuted, and whether compromises are needed to overcome the limitations of the law. Finally, there is the problem of deviations by citizens and by the actors in the system from the high ideal of the system: equal treatment of all men before the law. It is the ancient problem of the inevitable intrusion, wherever officials have discretionary power, of impermissible practices based on family, class, race or religion.

Who are the lawyers in the system? Once past the stage of apprehension by the police, the three major lawyer actors of the criminal

---

[2] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 5.

[3] *Ibid.*, p. 9.

[4] Lee Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (Chicago: American Bar Foundation, 1965), p. 7.

[5] *Ibid.*, p. 10.

[6] Abraham S. Blumberg, *Criminal Justice* (Chicago: Quadrangle Books, 1967), p. 11.

[7] *Ibid.*, pp. 29–30.

[8] Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown, 1966), p. 3. See also the article by Richard Pious, below.

[9] See the discussion in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts, op. cit.*, pp. 9–13.

system take over: the prosecuting attorney, the defense attorney, and the criminal court judge. What follows is a close look at the lawyer manpower in the divisions of prosecuting attorneys and defense attorneys, their numbers and their competency, insofar as such information is available. (The judges are discussed in a separate article.)

THE PROSECUTING ATTORNEY

The prosecuting attorney is the key public officer in the charging of criminal cases. Public prosecutors are generally organized on a county basis under the title of district attorneys' offices. There are some 2,700 district attorneys in the United States.[10] Some work full-time, directing offices with as many as 200 assistant prosecuting attorneys, as in Los Angeles, or 150, as in Chicago. But most serve alone in small offices with none, or one or two assistants. In many counties the job is part-time.

The prosecuting attorney has the responsibility to determine whether an alleged offense should be charged and to obtain conviction either through a guilty plea or trial. His decisions determine the disposition of all cases initiated by the police; his decisions will affect arrest practices of the police, the volume of cases in the criminal court, and the number of offenders referred to the correctional system of the state. His office is, indeed, a powerful one.

In all but four states the prosecuting attorney is elected to office, and he selects his assistant attorneys largely on political grounds. Americans have long held the belief that election of the district attorney is the best way to insure that his office will uphold their views about crime and serve their interests and demands about effective crime control. To hold him accountable and keep him honest he is elected frequently, usually every two to four years. Due to the election process turnover can be as high as one-third of all district attorneys in an election year.[11] When the chief goes most of the staff also goes.

It has been argued that such turnover reduces stultification and inefficiency in office. It has also been argued that the turnover is inefficient because it inhibits career development in the prosecutor's office.[12] Leaving political issues aside, it is not clear which argument has the most merit. On the one hand, there is a problem of "burn out" effect.[13] An assistant district attorney can only prosecute cases for so long before he begins to get jaded and to desire different work. On the other hand, there is evidence that where career development and job security are encouraged, the results are positive. For example, Los Angeles County has a civil service system for selection of prosecutors, whereas Chicago has an elective-patronage system. Los Angeles makes twice as many felony arrests in relationship to its population as does Chicago (782 arrests per 100,000 population versus 436), and convicts three times as many offenders as does Chicago (183 per 100,000 population versus 58). Final dispositions of felonies are reached at the preliminary hearing in 15 per cent of cases in Los Angeles and 75 per cent in Chicago.[14]

However, it must also be noted that merely taking the district attorney's office out of politics will not greatly reduce the high turnover of assistant prosecutors. This is primarily because, first, those who take the job are young lawyers who use the office as an apprenticeship in trial practice, or as a stepping stone to political office. Second, the salary, which averages $12,000 to $15,000, is rarely competitive with what a competent attorney can command in private practice. Third, public funds for a prosecutor's office are rarely sufficient to run the office most efficiently. Most prosecutors complain that their budgets do not allow for the necessary costs of investigation and research. And fourth, assistant prosecutors rarely can con-

[10] *Ibid.*, p. 73.
[11] William B. Randall, "The President's Page," *The Prosecutor*, 6, May–June, 1970, p. 153.
[12] *Ibid.*, pp. 73–74.
[13] Donald McIntyre and David Lippman, "Prosecutors and Early Disposition of Felony Cases," *American Bar Association Journal*, 56, December, 1970, pp. 1154–1159.
[14] David Lippman, "Some Perspectives on Research and Prosecutors," *The Prosecutor*, 5, July–August, 1969, pp. 257–260.

trol the outcome of cases. The manuals determine how a case is handled, which means that much of the excitement of trial practice is cut out of the post.

In short, it is hard to see how professional careers can be encouraged in the prosecutor's office under the present conditions of practice. In a few places, the salary is set high: $39,564 in Los Angeles County; $39,000 in Kings County, New York (Brooklyn). But in most places it is very meager, as in Morgan County, Missouri, where it is a part-time position salaried at $5,000 a year.[15] There are, of course, many highly competent attorneys who run for the office and serve well for one or two terms. But the pressures of the post and the low pay in most jurisdictions mean that few good men will stay on. This holds for assistant prosecutors as well. Rarely do graduates of national law schools become assistant prosecutors, or district attorneys for that matter. The office attracts graduates of the local metropolitan law colleges, especially from the night division.

THE DEFENSE ATTORNEY

Competent legal counsel is an absolute necessity in our criminal justice system. Criminal practice is different from civil practice, and few attorneys have had experience in criminal procedure. Not only is the law and the procedure different, there is an entire system to comprehend, with its own cultural norms. A good defense attorney not only knows the law and procedures; he knows which judges impose heavy sentences in particular offenses, and he knows how to use adjournment requests so as to come before the right judge. He also knows the court clerks and how to deal with them to get court assignments he wants for his client, and he knows how to deal with the prosecutor's office so as to maximize leniency or bargain for a reduced charge in return for a guilty plea.

There are two major ways in which the criminally accused receive legal representation in the United States. The major mechanism is by retaining private attorneys. For those who cannot afford to retain counsel, the state provides legal representation, if at all, through an assigned council program or a defender system or a combination of the two. There are two additional procedures that provide meager representation to indigent defendants—neighborhood law offices, operated under the Office of Economic Opportunity, and organized *pro bono publico* work by large law firms. Since 1967, neighborhood law offices have been prohibited by act of Congress from doing criminal work except where the public provides no alternative counsel for indigents.[16] *Pro bono* criminal work by larger firms is very limited. In the few places where there is indigent criminal defense work by neighborhood law offices and private law firms, it is invariably offered through assigned counsel or defender programs.

Private attorneys in criminal law. Like the legal profession itself, there is a wide range in the quality and professional status of those who do criminal defense work. In almost every major community in the nation, there are a small number of very skilled and very experienced criminal lawyers who assist well-to-do persons charged with criminal offenses and who, periodically, are assigned by the court to handle serious and complex cases involving indigent defendants.

Below these few top criminal lawyers there are a larger number of general practitioners who occasionally undertake criminal work for regular clients. Although competent civil attorneys, these men are too often unfamiliar with criminal procedure and are

(*Continued on page 47*)

[15] Selected recent salaries of prosecutors are listed in *The Prosecutor,* 5, September–October, 1970, p. 424.

[16] Economic Opportunity Act of 1964, as Amended, Title II, Sec. 222(a)(3).

Jack Ladinsky is Associate Chairman of the Department of Sociology at the University of Wisconsin, where he is also a Senior Research Associate of the Institute for Research on Poverty. His main interests are in the study of occupations and professions, sociology of law and poverty and law. He has written a number of articles on the legal profession, and is engaged in research on legal services to the poor.

Have judicial attempts to protect suspects by controlling illegal police behavior been successful? This specialist concludes that "to rely on state judges and juries to control police conduct involves the assumption that, by and large, those judges and juries share the constitutional values implicit in the development of effective remedies for illegal police behavior. It is an assumption of doubtful validity." The exclusionary rule, as he sees it, "probably has very little effect on police (nontestimonial) behavior."

Judicial Attempts to Control the Police

By Lawrence P. Tiffany
Professor of Law, University of Denver

From a logical point of view, the first question regarding judicial attempts to control police behavior in order to protect suspects is whether there is need for any control. Even if we assume that there is significant consensus that the police ought to comply with certain minimal standards of restraint and decency in the enforcement of the criminal law, control mechanisms nevertheless are not necessary in the absence of significant violation of those standards. That some police have repeatedly violated the most rudimentary notions of decency in the past and that they are doing so today are facts that few would care to dispute.[1] And if critics of the rule of exclusion mean to suggest that the police are sufficiently law abiding that no such rule is needed, the obvious answer is that if such were the case, the rule would present no difficulty because it could never be invoked successfully. This clearly is not the case.

These same observations lead to a rejection of the claim that while there is need for control, it should be vested within the police organization itself. The police hierarchy in too many cities either does not wish to exercise such control or cannot do so effectively. Furthermore, it would be anomalous indeed were we to grant such independence to police agencies which exercise one of the most intrusive of all state powers (the power of arrest), while such claims for independence and nonaccountability are increasingly being rejected in areas such as school administration and administration of public welfare.

Although it is clear that some effort must be made to control police behavior and that such control efforts ought to come from outside of police departments, there is little agreement on the best methods of exercising this control or who should bear primary responsibility for this watchdog function.[2]

FALSE IMPRISONMENT SUITS

Alternative ways to achieve control of police activities have existed in theory for some time. The best known of these is the civil suit for damages against an offending officer initiated by the one who was wronged. The most common of these tort actions are suits for assault, battery or false imprisonment ("false arrest").

The difficulties—both factual and legal—in successfully suing a police officer are not readily apparent, and the following discussion is designed to point out some of the problems inherent in relying on false imprisonment ac-

[1] A Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: 1967), p. 115.

[2] Warren E. Burger, "Who Will Watch the Watchman?" *American University Law Review*, vol. 14 (December, 1964), pp. 1–23.

tions as a stimulus toward a more responsible police department.[3]

In a false imprisonment suit, the plaintiff who sues an officer generally must allege that he was restrained by the officer, that is, that he was arrested. The defendant officer must then either prove that the plaintiff was not in fact arrested or that he, the officer, had legal authority to arrest him. If the plaintiff is successful in his claim that the defendant illegally arrested him, he is entitled to a monetary award to compensate him for the damages he has suffered. In some instances, the plaintiff may also be awarded punitive damages which are to punish the defendant rather than to compensate the plaintiff. Obviously, the law of false imprisonment is more complex, but this description will serve the purpose here.

It is generally agreed that false imprisonment actions do not operate as a significant deterrent to illegal arrests by the police, and several reasons can be advanced to explain why this is so. Many of the reasons for their inefficacy have to do with the "class of consumers" of illegal police conduct. They are largely the poor and uneducated who have little knowledge of how to vindicate their rights. Even if a poor and uneducated person finds his way to a lawyer to explore the possibility of a law suit, he will probably be discouraged. Lawyers in tort actions are normally compensated from the damages awarded, an arrangement called a contingent fee (contingent on winning and collecting from the defendant the amount awarded). A lawyer is therefore reluctant to bring such an action if the chances of winning a significant amount are slim.

Because part of the monetary damages is based on injury to the reputation of the plaintiff, the character of the plaintiff is usually in issue. If he is a person the jury is apt to view as an unsavory character, his monetary damages will not be large. If he has a criminal record, his story may not be believed. Punitive damages are difficult to receive because the plaintiff must not only win on the question whether the arrest was illegal, but he must also prove that the officer acted "maliciously" in making the arrest, probably meaning that the officer must have known that the arrest was illegal. Because of the low chance of winning at all, and the even lower chance of winning much, most cases that reach a lawyer probably do not proceed any further.

Even if illegal arrests more frequently led to successful false imprisonment actions, there is still doubt that much pressure is brought to bear or that the pressure is applied where it will be effective. In many cities, a damages claim against an officer will be defended by the city or out of funds from the local police benevolent association and in some cases these organizations will also pay the damages if the suit is lost. Furthermore, if control of a department is what is sought, it is doubtful that this may be accomplished by putting financial pressure on an individual patrolman, although there is, of course, some carryover to others who know the outcome of the suit.

There are other alternatives available to control illegal arrests and searches but none of them are thought to be effective. Criminal prosecutions are not actually undertaken although in some circumstances they could be. Civilian review boards await significant implementation.[4] Federal injunctions show some promise as a means of control but injunctive relief is often a clumsy instrument in this context.[5]

To establish further safeguards against illegal police conduct, in 1961 the United States Supreme Court held in *Mapp v. Ohio*[6] that it was a violation of due process for a state court to use any evidence in a criminal prosecution obtained by police by an unreasonable arrest or search. The assumption underlying the rule was that when police officers violated the constitutional rights of

[3] A more detailed analysis of the problems is found in Caleb Foote, "Tort Remedies for Police Violation of Individual Rights," *Minnesota Law Review*, vol. 39 (April, 1955), pp. 493–516.

[4] Spencer Coxe, "The Philadelphia Police Advisory Board," *Law in Transition Quarterly*, vol. 2 (Summer, 1965), pp. 179–185.

[5] Note, "Section 1983: A Civil Remedy for the Protection of Federal Rights," *New York University Law Review*, vol. 39 (November, 1964), pp. 839–857.

[6] 367 U.S. 643 (1961).

suspects, their objective was to secure evidence to be introduced against the suspect at a criminal trial. The rule sought to prevent illegal police conduct by removing that incentive.

The *Mapp* exclusionary rule is only one of several rules which exclude evidence from criminal cases in an effort to control police conduct. Exclusionary rules which are closely related in their rationale also provide remedies when the illegal conduct of the police involves interrogation.[7] However, the *Mapp* rule may be taken as a prime example of judicial attempts to control police.

A majority of the Supreme Court settled on the exclusionary rule despite the fact that, as a practical matter, the existence of the rule in many cases means, as Justice Benjamin Cardozo put it, "[t]he criminal is to go free because the constable has blundered."[8] Whether the cost is too high will depend in large part on the value judgments of the observer, but certainly a relevant factor in making that evaluation is whether, in fact, the rule is structured in such a way that society is the beneficiary of a higher level of observance of constitutional restraints by police. It is not a captious comment on the state of research in criminal justice administration to concede that we do not know the impact of the rule.[9] It may nevertheless be useful to discuss some of the reasons why the exclusionary rule ought not to be viewed either as a panacea for police illegality or as an instrument for judicial destruction of "efficient" crime control.

[7] Yale Kamisar, "The Citizen on Trial: The New Confession Rules," *Current History,* August, 1967, pp. 76–81.

[8] *People* v. *Defore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[9] Monrad G. Paulsen, "The Exclusionary Rule and Misconduct by the Police," *Journal of Criminal Law, Criminology and Police Science,* vol. 52 (September–October, 1961), pp. 255–265.

[10] Wayne R. LaFave and Frank J. Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, *Michigan Law Review,* vol. 63 (April, 1965), pp. 987–1012 (hereinafter cited as "Controlling the Police").

[11] Donald M. McIntyre, Jr. (ed.), *Law Enforcement in the Metropolis* (Chicago: American Bar Foundation, 1967), p. 47 (hereinafter cited as *Law Enforcement*).

EVIDENCE NOT NEEDED FOR CRIMINAL PROSECUTION

The operational assumption which underlies the Court's adoption of the exclusionary rule has been pointed out. It is that when police behave illegally they do so for the purpose of acquiring evidence to secure a conviction. By denying use of evidence obtained by an illegal arrest or search and creating a probability that a conviction cannot be obtained, the rule is intended to punish the offending officer and to deter him and others from engaging in similar conduct in the future. "Obviously, such a rule can have an impact only in those cases in which the police desire a conviction, which is not true with regard to many offenses today."[10] There are many ways in which police can discourage what they view as deviancy; the conviction process is only one of the alternatives. The following quotation is a description of one harassment practice:

> *Confiscating telephones*—When investigation reveals that a telephone on the premises has been used to convey gambling information, the officers making the arrest remove the telephone, whether or not they legally gained access to the premises. The phone is tagged as evidence and a memorandum prepared by the officers staging the raid addressed to the chief investigator in the prosecuting attorney's office. This memorandum contains a description of the offense that took place and the manner in which the phone was used for the conveyance of gambling information. A copy of the memorandum is sent to the telephone company, which will refuse to reinstall a telephone at the premises until clearance is obtained from the prosecuting attorney's office. The prosecuting attorney's office has, in turn, delegated this decision to the inspector in charge of the vice bureau. During 1956 approximately 200 telephones were confiscated by officers assigned to the vice bureau. Under this system a telephone may be removed from the premises, despite the fact that the individual may not be prosecuted. The inspector cited this practice as one which is particularly effective in harassing "bookie" joints.[11]

The police use of clearly illegal searches and seizures is not limited to vice crimes where convictions are difficult to obtain. Such searches are engaged in for many other reasons. The following description repre-

sents police attempts to prevent rather than detect crime.

Weapon confiscation—In some sections of large cities there is a high incidence of serious, assaultive behavior involving the use of guns, knives, or other dangerous weapons. One police response to this problem is a continuing effort to remove dangerous weapons from persons in those areas. Special squads of police allocate a substantial part of their time to stopping and searching males found on the street. . . . In most instances, the officers have no grounds for suspicion other than the facts that it is night, that the "suspect" is male, and that he is in an area with a high crime rate. Such areas are predominately inhabited by minority racial groups. During one typical evening, two officers engaged in twenty such stops, during which they searched thirty-seven persons and eleven cars.

This practice is primarily preventive rather than investigative because the officer's primary objective is to find and confiscate weapons rather than to prosecute those who illegally possess weapons. Since there is no particular police concern with prosecution, evidentiary standards enforced by the threat to exclude the evidence illegally obtained do not deter the police from engaging in these practices.[12]

These instances of illegal police conduct, not designed to secure evidence to be used in a criminal prosecution, are not rare examples; rather, they reflect only a small part of such conduct. The point is that the primary assumption which underlies the *Mapp* rule is substantially untrue and, to that extent, it may be supposed that the exclusionary rule is not a deterrent to much illegal conduct by police.

A second assumption about the nature of the criminal justice system seems implicit in this suppression doctrine. The rule excludes ("suppresses") evidence from trials held to determine the guilt or innocence of the defendant. In fact, the vast majority of convictions in the United States are based on a plea of guilty by the defendant rather than a verdict of judge or jury.* The accused usually cooperates in his own conviction. When he does, it is not necessary for the state to introduce any evidence of his guilt.[13] Thus, if there is some question about the legality of the method by which the police obtained evidence against the accused, it seems probable that the doubt which this would cast on the convictability (if not the guilt) of the defendant simply becomes another factor which the parties will take into account in the bargaining process which normally precedes the plea of guilty.[14] Part of the consideration a defendant has to offer in a bargain is the certainty of his conviction. In exchange for an agreement not to challenge the method of police acquisition of evidence, the defendant can insist on a concession from the prosecutor in terms of the probability or length of incarceration.

A third limitation on the efficacy of the rule is that in many instances the illegal conduct by the police may not result in evidence needed to convict even if the defendant should insist on a trial. For example, the state may be in possession of other, sufficient evidence lawfully obtained upon which the police may base the prosecution. In that case, the accused can be convicted even though he is successful in requiring suppression of the illegally obtained evidence. Perhaps more commonly, the illegal conduct simply may not result in acquisition of any evidence. In such a case, the exclusionary rule is not helpful at all to the defendant and cannot be taken as a deterrent to ensure police restraint.[15] Just as clearly, searches or arrests of innocent persons will not result in invocation of the exclusionary rule.

PROCEDURAL OBSTACLES

There are numerous procedural "loopholes" in the exclusionary rule, but mention will be made of only one. This is the so-called "standing" rule, which means that only the person whose constitutional rights

* *Editor's note:* See the article by Richard Pious that follows, pp. 20ff.

[12] Lawrence P. Tiffany, Donald M. McIntyre, Jr., and Daniel L. Rotenberg, *Detection of Crime* (Boston: Little, Brown and Co., 1967), p. 13 (hereinafter cited as *Detection*).

[13] This rule may change somewhat as a result of *McCarthy* v. *United States,* 394 U.S. 459 (1969).

[14] Donald J. Newman, *Conviction* (Boston: Little, Brown and Co., 1966), pp. 76–131.

[15] The United States Supreme Court has consistently held that the manner of obtaining the physical presence of the defendant does not affect the power of the courts to try him. See, e.g., *Frisbie* v. *Collins,* 342 U.S. 519 (1952).

were violated may properly make a motion to suppress evidence at trial. If the evidence is illegally seized from one person and it incriminates a second person, that evidence may be introduced at the trial of the second person; he will be said to lack "standing" to cause suppression of the evidence.[16]

The Police Milieu. Efforts to control police frequently assume that the patrolman on the beat is actually amenable to control by judicial implementation of the exclusionary rule. Professor Geoffrey Hazard has summarized this point:

> How the police go about enforcing the criminal law is a product not only of the legal rules governing police practice and of police professional training and leadership, but also of the social environment that inheres in being police. This will not be news either to sociologists or to lawyers and police who have thought about the matter, but it is a fact widely ignored or half-heartedly conceded by people whose business it is to make the criminal law. It is also of capital importance. Assuming the will to do so, the legal rules governing police practice can be manipulated by legislative and judicial processes, and police professional training and leadership can be manipulated by educational and administrative processes. But the social environment of American police work as an occupational calling is not susceptible to manipulation by the direct exercise of will, anymore than Eskimos are susceptible to being made into gastronomes. This means that how the police can function is bounded by limiting conditions that are beyond the reach of immediate reform. Acceptance of these limiting conditions is difficult, especially in a society convinced that the realization of Eden is a problem of landscape architecture. It is also essential to unromantic policy in the criminal law.[17]

One social constraint which is not subject to easy manipulation is a working police perception of danger, and in police perceptions of their working environment danger is often equated with deviance. This process is identifiable in field interrogation practices. Persons subjected to field interrogation often attract the attention of police because of unusual ("deviant") appearance or behavior; they are usually males in public places at night in high crime areas—all factors contributing to police perceptions of dangerousness. In part, therefore, the persons selected as the objects of field interrogation dictate the usual police procedures in conducting that field interrogation.

> Most persons stopped for interrogation do not constitute any threat to the safety of the interrogating officer. This is true even though they may be guilty of some offense. But recognizing that most persons interrogated are harmless only emphasizes the fact that some are not. Officers are sometimes attacked by persons stopped for interrogation, and such incidents are normally attended by considerable publicity. In addition, there is no way officers can identify in advance which suspects are likely to be dangerous.
>
> The officer's lack of ability to predict reliably whether a particular suspect is armed and dangerous, combined with a high degree of danger to him if he makes a wrong guess, results in the officer's feeling that he must constantly be on guard.[18]

The police perception of danger in the field interrogation context leads to frequent displays of weapons and searching of suspects. "Thus the exceptional case, an assault on an interrogating officer, dictates what self-protection procedure will be used in the routine case."[19] It is obviously futile, therefore, to tell an officer in an uncertain situation that any evidence he may turn up during such an on-the-street search will be unusable in any forthcoming prosecution. Such a rule would play only a miniscule part in his decision calculus.

Police Perjury. Violations of procedural rules by the police are often viewed by them as not only necessary but morally justifiable. It is not surprising, then, that when evidence of guilt is obtained by illegal police conduct which would lead to suppression of that evidence, perjury by the police officer to redescribe the means of acquisition has become commonplace. Even spokesmen for police interests will admit that this is occurring with great frequency. Evidence of this may be found in the remarkable increase in so-called

---

[16] Note, "Standing to Object to an Unlawful Search and Seizure," *Washington University Law Quarterly*, vol. 1965 (December, 1965), pp. 488–520.

[17] Geoffrey C. Hazard, Jr., "Book Review: Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society," *University of Chicago Law Review*, vol. 34 (Autumn, 1966), p. 227.

[18] *Detection*, pp. 44–45.

[19] *Ibid.*, p. 45.

"throw-away" cases. In these cases, usually involving narcotics, the evidence given by the police officer on hearing of the motion to suppress is that while approaching a suspect on the street (or in some cases, merely walking past him), the suspect suddenly took something out of his pocket, threw it away and then ran. An examination of the article thrown away reveals heroin. Certainly some throw-away cases do occur, but dramatic increases in their frequency since the exclusionary rule must be illusory. *Testimony* of police officers is evidently more subject to dramatic shift than is the *behavior* of police.[20]

THE RULES TO BE ENFORCED

Apart from legal limitations on the scope of the rule, there are many other problems which undoubtedly contribute to a lower level of success than might otherwise be expected. The legal rules of conduct to which the police are expected to conform are often ambiguous, shifting, nonsensical, and not communicated to the police.

An example of the first is the rule announced in *White v. Maryland:*[21] a suspect is entitled to a lawyer at any "critical stage" of the criminal process. It is still not clear to criminal lawyers what that means. Second, the rules change frequently, and often a court will declare police conduct illegal even though it was considered proper under the rules that existed at the time of the conduct.[22] Third, there is frequently insistence on adherence to rules which seem to make little sense. For example, in most states, an officer may not arrest a suspect for a misdemeanor without a warrant unless he actually sees the offense committed.[23] Finally, there is usually no systematic effort on the part of the judiciary or anyone else at the local level to explain to the arresting officer why a motion to suppress was granted or to explain how he could legally acquire the same evidence in the future. Less often is there systematic dissemination to all the members of the department concerned.[24]

The failure of trial courts to explain the reasons for their conduct is especially critical, since in many states (although this is changing) the state cannot appeal to a higher court if the ruling on the motion to suppress is adverse. Thus, a reversal-conscious judge feels pressure to decide in favor of the defendant and against the state because a decision adverse to the defendant is the only possible ruling which is subject to being reversed by a higher court.

Much public clamor has existed over the problem of "respect for the law." If there is any foundation to the assertion that one of our major problems is the existence of criminal codes which contain laws viewed by a significant part of society as overreaching or, indeed, simply asinine, then perhaps such an observation has significance for the problem of controlling police behavior. It has been noted that before we undertake to establish efficient machinery for the administration of criminal law we should be concerned first that the criminal law is reasonable; before we set out to control undesired behavior, we ought to make sure that the behavior is clearly undesirable.[25] Perhaps the lesson here is that before we insist on effective means of requiring police conformance to procedural rules

---

[20] For example, Richard H. Kuh, writing in the *New York Law Journal,* vol. 148 (September 18–19, 1962), p. 4, in an article entitled "The Mapp Case One Year After: An Appraisal of its Impact in New York," said:

> One defect in this aspect of the Mapp case must —in candor—be recognized. Skeptics, including in their rank some very able and very wise trial judges—as well as prosecutors and police—suggest that with the Mapp decision came an increase, significant in its proportions, in "accommodation" by police officers *of their stories,* not always *of their actions,* to the law.

This comment was verified in a study concerning the effects of the Mapp decision on the search and seizure practices of the New York City Narcotics squad. *See* Note, "Effect of *Mapp v. Ohio* on Police Search-and-Seizure Practices in Narcotics Cases," *Columbia Journal of Law and Social Problems,* Vol. 4 (March, 1968), p. 87.

[21] 373 U.S. 59 (1963).

[22] See *e.g., Katz* v. *United States,* 389 U.S. 347 (1967).

[23] Wayne R. LaFave, *Arrest* (Boston: Little, Brown and Co., 1965), pp. 231–243.

[24] *Controlling the Police,* pp. 1003–1006.

[25] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), pp. 364–366.

we should take care to insure that the procedural norms upon which we insist are in fact compatible with the operational environment of police work. Proliferation of inflexible legal rules which are inconsistent with reasonable operational rules has undoubtedly contributed to police dissatisfaction with judicial interferences in their work and, we might speculate, has contributed significantly toward the claim of political independence of police departments.

It should not be surprising, then, that one of the most important effects of the exclusionary rule is the development of more sensible rules of arrest, search and seizure. Prior to that sanction, the rules mattered little. Now it is perceived to be important to have realistic rules and many have been developed throughout the decade of the 1960's. Some have restricted police powers; some have expanded them. All of them evince a more determined effort by the Supreme Court and some other courts to achieve a fair balance of the sometimes conflicting interests in freedom and crime control.

THE ROLE OF THE JUDGE

Doctrinal development has, at times, flirted with notions of preventive control rather than "sanctions" designed to "punish" officers for past transgressions as the dominant means of controlling police behavior. The chief mechanism of this control device is the warrant.

It is often asserted that adherence to higher standards of behavior would be advanced by requiring approval of a judge before a suspect could be arrested or searched. Obviously, a predicate for such a system is the insistence that a warrant be obtained; it will not work if the warrant process is merely an alternative way the police may proceed. Although the United States Supreme Court seems at one point to have enunciated a rule that whenever the exigencies of the situation permitted, the police were required to obtain prior judicial approval of actions interfering with a suspect,[26] they have since indicated that this is not the rule.[27] As a result of this clarification, there has been a renewed effort to gain adoption of such a rule.

There is little evidence to suggest that such a rule would be effective in controlling police behavior. The contrary is true. Empirical studies have clearly indicated that many judges do not take the performance of such a task seriously.[28] Police requests for warrants are often routinely granted with little or no judicial inquiry into the facts. The most probable outcome of such a rule is that in response to an overwhelming number of requests, judicial acquiescence would become even more routine than it is now.

CONCLUSION

The conclusions drawn in a recent study of the impact of the exclusionary rule[29] support the inference one would intuitively draw from the prior discussion of the problems inherent in the rule: it probably has very little effect on police (nontestimonial) behavior. There is no particular reason to be sanguine about the effectiveness of revamped tort procedures that have been urged as a substitute. I suspect instead that when the political climate shifts enough to permit development of effective remedies for illegal police practices, most of those practices will have ceased by virtue of that fact alone, and new remedies will be superfluous. With no hard evidence, I nevertheless suspect that the converse is also true:

(Continued on page 52)

Lawrence P. Tiffany joined the law faculty at the University of Denver in 1964 where he teaches criminal law and criminal procedure. He is coauthor of *Detection of Crime* (Boston: Little, Brown, and Co., 1967) and has authored a number of articles relating to criminal justice administration. During the 1969–1970 academic year, he participated in the Scholar-in-Residence Program of the American Bar Foundation.

[26] *Trupiano* v. *United States,* 334 U.S. 699 (1948).

[27] *United States* v. *Rabinowitz,* 339 U.S. 56 (1950).

[28] *Law Enforcement,* pp. 50–52.

[29] Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," *University of Chicago Law Review,* vol. 37 (Summer, 1970), pp. 665–757.

"The system of criminal justice in the lower courts is well on its way to total collapse. It provides precious little justice. . . . At best, only a rough equity is provided, and that at the cost of the deterrent power of the criminal code."

Pretrial and Nontrial in the Lower Criminal Courts

By Richard M. Pious
Instructor of Political Science, Columbia University

This article describes the criminal justice system from the time of the arrest to the trial or release of the defendant, including the initial appearance before the magistrate and the decision to set bail, the preliminary hearing, the indictment or information in felony cases, and the arraignment for the plea. Before the trial the prosecutor, the judge, and the defendant may agree on a disposition of the case which avoids a trial; therefore all pretrial proceedings are a part of the non-trial system as well.

Since the judicial system of each state is unique, the District of Columbia has its own system, and federal district courts are governed by the *Federal Rules of Criminal Procedure,* the description of the process applies generally rather than precisely to all jurisdictions. At present, all systems are in flux, and descriptions are outdated very rapidly.

THE INITIAL APPEARANCE

After a suspect is arrested the police must bring him promptly before a judicial officer. Rule 5 of the Federal Rules requires that he be brought before a magistrate "without unnecessary delay." The effect of two leading Supreme Court cases (*McNabb v. U.S.*, 318 U.S. 332, 1943, and *Mallory v. U.S.*, 354 U.S. 449, 1957) is to exclude evidence obtained from the accused in a trial if he has not been produced promptly for the initial appearance. The District of Columbia Crime Bill of 1967 authorizes an investigative detention of three hours, while the Omnibus Crime Control Act of 1968 permits in certain conditions a six-hour delay without exclusion of evidence.[1] States may permit longer delays, but almost never more than 24 hours.

Between the arrest and the initial appearance the suspect in felony cases and serious misdemeanors must be advised of his constitutional right to remain silent and to have counsel present at the lineup or interrogation. Violation of the defendant's rights is grounds for exclusion of evidence obtained from the defendant at the trial. This is true in both federal and state proceedings.

In felony and serious misdemeanor cases, the police and prosecutor use the time prior to the first judicial appearance to investigate the case. If the arrest was the result of a complaint rather than observation by a police officer, investigation may result in charges being dropped. The prosecutor also determines whether the police acted legally in making the arrest, especially if a search or a seizure was involved. He may drop the case if evidence was improperly obtained. The prosecutor attempts to gain admission of certain facts and a confession from the accused.

In less serious misdemeanors, especially

[1] Public Law 90-226, Title III (1967); Public Law 90-351, Title II (1968).

those in which the police officer is the only witness, arrest of the defendant may not be desirable. For one thing, the drain on police manpower in taking the defendant to the police station, then to a detention facility, and finally to a magistrate is considerable. Some jurisdictions are replacing the arrest system with a summons or citation system in which the accused is directed to appear before a magistrate at a particular time. In New York City, for example, in cases of simple assault, petty larceny and malicious mischief, the accused is interviewed at the stationhouse and the precinct desk officer is authorized to release him with a summons. More than 95 per cent of those released appear at the scheduled time.[2] (Some of the remainder are in jail for other crimes or are in the armed forces.) The *Federal Rules* authorize such a summons system, but at present it is in regular use only in the United States District for Northern California. State or city systems operate in California, Michigan and Washington, as well as in New York.

At the initial appearance, which usually occurs within hours after an arrest or days after a summons or citation, the magistrate or judge will inform the defendant of his right to counsel, will assign counsel if the defendant requests it, and will set a date for a preliminary hearing. He will also set bail.

THE BAIL SYSTEM

Bail is the requirement of a cash bond or collateral from the defendant or the setting of some non-financial condition which will ensure that the defendant will return for trial. The Eighth Amendment states that "excessive bail" cannot be required. Some leading historians of the bail system, such as Caleb Foote, argue that the framers intended to make bail an absolute right for defendants in all cases.[3] But the Federal Judiciary Act of 1789, subsequent federal legislation and most state legislation exclude capital crimes from the bail system.

In both the federal and state court systems, the major criterion for release is supposed to be the probability of appearance for the trial. In practice, judges sometimes set bail according to the nature of the offense or the possible danger to the community if a defendant were released. High bail has become a means of preventive detention of defendants before trial. Moreover, civil rights demonstrators and other protestors arrested at demonstrations have sometimes been held in high bail for minor offenses.[4]

Most defendants find it difficult to post the entire amount of a cash bond. Instead, they pay a premium to a bail bondsman, who provides the bond for the court. In practice, the bondsman decides whether or not a defendant will be released. The unpopular defendant may be refused a bond. The poor defendant cannot provide the collateral needed for a bond. The professional criminal, on the other hand, is considered a "good risk" and can often obtain a bond with no collateral.

In many states, the bondsmen have not been regulated. Some are affiliated with organized crime syndicates. Others engage in unethical referrals with lawyers, and some bribe police who will refer clients to them. Premiums are not always regulated, and sometimes are between 10 and 20 per cent of the bond set.

Most of the poor are unable to make bail. In New York City in 1966, for example, one-fourth of the defendants could not make $500 bail, almost one-half could not make $1,500, and almost two-thirds could not make $2,500.[5] Defendants who cannot make bail are placed in pretrial detention facilities—in other words, in jail.

The pretrial detention facilities in most states are old (one-fourth are over 50 years old) and in dilapidated condition. Most are overcrowded, with no facilities for exercise, recreation or rehabilitation. Visiting hours are short and inconvenient; phone calls are

[2] James S. Campbell, *et al., Law and Order Reconsidered* (A Report to the Eisenhower Commission on the Causes and Prevention of Violence), p. 440; also The VERA Institute of Justice, *The Manhattan Summons Project* (New York, 1969).

[3] Caleb Foote, "The Coming Constitutional Crisis in Bail," 113 *University of Pennsylvania Law Review* (1965).

[4] Campbell, *op. cit.*, p. 432.

[5] President's Commission on the Administration of Justice, *The Courts* (Washington, D.C., 1967), p. 37.

prohibited; and mail is censored. Defendants placed in jail cannot investigate their cases, and certainly cannot pay anyone else to investigate for them. Families, deprived of the head of the household, also suffer financial and personal hardship. The first offender is placed in contact with repeaters, and may become bitter and disillusioned.

Early in 1971, there were over 80,000 people being held in state prisons who had not been convicted of any crime.[6] In large cities the time spent in jail waiting for trial could be considerable: in 1971, in New York City, the average length of time was 114 days, and in Philadelphia, 160 days. Two-fifths of the inmates in New York City in 1970 waited a year or more for their cases to be tried.[7]

A person detained before trial may find his case prejudiced. In Philadelphia, two groups of defendants were studied: one group had made bail and had been freed, the other had not and had been jailed. Of 529 defendants who made bail, only 275 were convicted of crimes, and only 61 were sentenced to prison—22 per cent of those convicted. Of the 417 defendants who could not make bail, 390 were convicted, and 200, or 59 per cent of those convicted, received prison sentences.[8] In New York City, a study revealed that 54 per cent of those convicted of crimes received suspended sentences if they had been on bail, while only 13 per cent of those who had been in pretrial detention received suspended sentences.[9] Little of this disparity could be explained by the difference in the characteristics of the two groups.

BAIL REFORM

The cash bail system is based on the assumption that if a defendant posts bail he will appear for trial. In 1961, the VERA Foundation, New York University, the Ford Foundation and the New York City criminal courts began to experiment with non-financial release conditions.[10] The Manhattan Bail Project permitted the release on recognizance (a promise by the defendant to the court that he will return) in certain categories of offenses after interviews with law students from New York University. The interview established the defendant's ties in the community, which became the criterion for non-financial bail conditions. In the first 30 months of the project, 99 per cent of those released returned for trial, compared to 97 per cent of those released on bail.

Moreover, the release on recognizance affected the disposition of cases. The released group was compared with a control group of defendants eligible for release but instead not released for lack of bail funds. In the group released, three-fifths were not convicted, and of the two-fifths convicted, only one-sixth were sent to prison. In the control group of those eligible for release but actually placed in pretrial detention, less than one-fourth were not convicted. Nine out of ten defendants convicted were sent to prison.[11]

The National Conference on Bail and Criminal Justice, sponsored by the United States Department of Justice in May, 1964, concluded that the bail system needed reform. In 1966, Congress passed the Bail Reform Act, which authorized federal judges to release persons charged with involvement in other than capital offenses on a promise to appear for trial, an unsecured bond, the custody of a third person or organization, or on a premium on a bond deposited in the court and refundable upon appearance for trial.[12] The judge could impose non-financial conditions on release, including restrictions on travel, abode and associations. All conditions could be quickly appealed in the district and appellate courts.

The Bail Reform Act did little to change the system in practice. Only in the District of Columbia is provision made for a Bail Agency which can advise the judges on conditions they should set for bail. Elsewhere the federal judges continue to rely on financial

[6] *The New York Times,* January 6, 1971.
[7] *The New York Times,* March 8, 1971.
[8] Campbell, *op. cit.*, p. 435.
[9] *Ibid.*, p. 436.
[10] Charles Ayres, Ann Rankin, Herbert Sturz, "The Manhattan Bail Project," 38 *New York University Law Review* 67.
[11] Campbell, *op. cit.*, p. 438; also VERA Institute of Justice, *The Manhattan Bail Project* (New York, 1969).
[12] 18 *U.S.C.* 3146.

conditions. There is no agency to supervise those released on non-financial conditions. Few social agencies are prepared to accept defendants in third-person custody, and there is no mechanism for referral.[13] It is doubtful that states will adopt non-financial conditions, since additional funds are required in order to make such a situation work. New York City is an exception: the success of the Manhattan Project led to its expansion and the assumption of investigative duties by the Office of Probation.

PREVENTIVE DETENTION

Preventive detention has recently been proposed in federal and state legislation as a new bail reform. Such preventive detention would be based on a judgment by a judicial officer that the release of the defendant on bail before trial would constitute a danger to the community. A number of study commissions have endorsed the concept, including the President's Commission on Crime in the District of Columbia (1966), the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia (1969), and the President's Commission on the Administration of Justice (1966).[14] However, the Task Force of the Eisenhower Commission on the Causes and Prevention of Violence rejected it in 1970.[15]

Studies have produced conflicting estimates of the percentage of defendants released before trial who commit additional crimes in that period. In 1968, a study by the Department of Justice conducted for four weeks in the District of Columbia indicated that 11 per cent of those released were charged with additional felonies or misdemeanors. Two-thirds of the latter charges involved misdemeanors, and most occurred at least 30 days after the original charges.[16] Thus, if trials had taken place sooner, many of the later crimes might not have occurred.

President Richard Nixon proposed a preventive detention system for federal courts on July 11, 1969, with the introduction of S2600 in the Senate. A similar provision for the District of Columbia, S2100, was introduced later. These measures would permit a federal judge to consider the danger to the community in setting non-financial conditions for bail, and would also permit him to order a defendant detained for 60 days before trial in certain specified felony cases, or where a defendant was attempting to harm or threatened to harm a juror or witness. These measures were aimed primarily at recidivists. Neither bill was passed in 1969.

In the spring of 1970, the bills were again introduced, and 14 other preventive detention bills were filed in Congress. In May, hearings were held before the Senate Judiciary Subcommittee on Constitutional Rights. Officials of the Department of Justice testified for preventive detention; in opposition were Sam Ervin, the subcommittee chairman, and former Attorney General Ramsey Clark. On June 18, the American Bar Association went on record opposing preventive detention, and the following day the proposal was opposed by the American Civil Liberties Union. The measure has not passed in Congress.

Preventive detention has been authorized in the District of Columbia with the passage of the D.C. Court Reorganization and Criminal Procedure Act of 1970, signed into law on July 29, 1970.[17] Beginning on February 1, 1971, it authorized preventive detention for up to 60 days, and speedy trials for those detained. In February, two narcotics addicts were detained by a judge even though the Prosecutor's Office had not recommended it. The Prosecutor withdrew a request for preventive detention in a case involving a suspect charged with felonious assault who had been convicted of 37 misdemeanors and who was also facing charges for murder and robbery.

---

[13] Robert Bogomolny and Michael Sonnenreich, "The Bail Reform Act of 1966," 11 *Arizona Law Review*, No. 2, Summer, 1969.

[14] President's Commission on Crime in the District of Columbia, *Report* (Washington, D.C., 1966), pp. 527–529; Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, *Report* (Washington, D.C., 1969); Task Force Report, *The Challenge of Crime in a Free Society* (Washington, D.C., 1967), p. 131.

[15] Campbell, *op. cit.*, p. 452.

[16] *Congressional Quarterly Weekly Report*, July 17, 1970.

[17] 84 *U.S. Stat.* 473; 23 *D.C. Code* 1322.

A United States magistrate refused to grant pretrial detention in a case involving assault with intent to rape, instead releasing the accused to the D.C. Welfare Department with strict bail conditions. Two other prosecutor's requests were also denied by the courts in February.[18] Until the Supreme Court ruled on challenges to the act brought by the American Civil Liberties Union and the Defender's Service of the District of Columbia, it was likely that it would be used sparingly in the District.

Some states are preparing their own preventive detention acts. On March 22, 1971, a bill was introduced in the New York State legislature which would deny bail to those accused of a serious crime if they had been convicted of a similar charge within 10 years prior to the arrest, if the judge found that the release posed a danger to the community.[19]

Those who favor preventive detention argue that certain persons, such as drug addicts, are likely to commit crimes while released on bail. Preventive detention is currently authorized in capital cases, and is practiced when high bail is set in other cases. The proponents of the measure argue that it will regularize the procedure, provide for safeguards and review and give priority to those detained in setting trial dates.

Those who oppose preventive detention argue that it might be unconstitutional, since it may violate the Eighth Amendment. In addition, it may be unworkable.[20] There is no way to distinguish between defendants who will commit additional crimes and those who will not. For a judge to make a determination, he would need additional investigative resources. Instead of spending the funds for that purpose, opponents of preventive detention urge that additional judges should be provided to speed up trials. This would limit the possibility that a person released on bail would commit additional crimes. Preventive detention, it is further argued, might prejudice a jury, especially since in the District of Columbia it can only be used if a judge finds "substantial probability" that the person is guilty of the offense charged.

Preventive detention measures could open the door to the repression of free speech, demonstrations and political activity. If "conspiracy" were added to the list of crimes, the measure could keep political activists in jail and prevent the adequate preparation of defenses. One could certainly expect this result in state courts, especially in the South.

OTHER STEPS LEADING TO TRIAL

The other proceedings which lead to trial are the preliminary hearing, the grand jury indictment or prosecutor's information in felony cases, and the plea arraignment. The purpose of these proceedings is to permit the defense to discover a reasonable amount of the prosecution case (in return for revealing some of its own case) and to allow the prosecution to convince the court that there are grounds for a trial. The preliminary hearing forces the prosecution to present a *prima facie* case that the defendant is guilty, and if it cannot do so the charges will be dismissed. Ordinarily, the defense presents no evidence of innocence, although the Supreme Court in a series of cases (*Gideon v. Wainright,* [372 U.S. 335, 1963], *White v. Maryland,* [285 U.S. 262, 1958], *Pointer v. Texas,* [7 Wallace 700, 74 U.S., 1869]) gives the defendant the right to have counsel present. The prosecution also uses the hearing to obtain testimony from witnesses while events are fresh in their minds.

In felony cases the next step in the federal system and in about half the states is the grand jury presentation. The proceedings are held in secret, and witnesses may be offered immunity for testifying, or charged with contempt if they refuse to testify. The prosecutor conducts the proceedings. The grand jury either returns an indictment or, if the evidence is insufficient, dismisses the charges. In states that do not use a grand jury, the prosecutor proceeds after the preliminary hearing by filing an information with

[18] *The Washington Post,* February 13, February 17, 1971.
[19] *The New York Times,* March 23, 1971.
[20] Campbell, *op. cit.*, pp. 450–452; "Note: The Costs of Preventive Detention," and "Note: Constitutional Limitations on the Conditions of Pre-Trial Detention," both in 79 *The Yale Law Journal,* No. 5, April, 1970.

the court. In both systems, the defense may waive both the preliminary hearing and the grand jury proceeding in the federal system and in many states. The defense may wish to do this in order to prevent the prosecution from discovering certain testimony, or finding out if the defendant intends to plead guilty.

The next step is the arraignment. The purpose of this step is to plead not guilty or guilty. If the plea is not guilty a trial date is set; if the latter, a sentencing date is set. The defendant at this time requests or waives a jury.

After the arraignment, the defense will make its pretrial motions, in which it seeks the discovery of certain evidence which the prosecution may possess, or a change of venue, and so forth. These motions lead up to the actual trial, at which guilt or innocence is determined by a judge or by a jury.

Most of these proceedings move slowly, with adjournments of the trial date common. Thus there is ample time for the defendant to commit additional crimes if on bail. For those defendants held in jail, there is time to become disillusioned with the system and brutalized by jail conditions.

Delay is caused primarily by certain defendants. They may want time to arrange private affairs in case of conviction. Delay may be useful if the prosecution relies on witnesses; time may dim their memory or they may be persuaded to change their testimony. Delay may enable the defendant to shop around for a lenient judge. Defense counsel may explain to the judge that "Mr. Green," a key witness, is not present. This is a code phrase which means that the attorney has not been paid by his client. The judge will oblige the attorney by adjourning the case until the defense counsel receives his fee.

THE NON-TRIAL SYSTEM OF CRIMINAL JUSTICE

The increase in crime rates and arrests and the delays caused by defendants produce overcrowded court calendars. The result is that approximately half the arrests result in the dismissal of charges or the dropping of charges, and nine of ten of the remaining cases are disposed of without trial after pleas of guilty. Less than one-tenth of those persons charged with crimes ever go to trial.[21]

Prosecutors have a number of reasons for dropping charges. First, the police may have acted improperly in making the arrest or obtaining evidence. The prosecutor may not want to brand a defendant, especially a juvenile or a prominent citizen, as a criminal. Charges are often dropped in domestic disturbances, assaults, petty thefts and shoplifting, joyrides, drunkenness, disorderly conduct and vagrancy.

PLEA BARGAINING

Nine of ten cases in which charges are not dropped result in guilty pleas to the original or lesser charges. The defendant pleads guilty at the arraignment after his counsel confers with the prosecutor and sometimes with the judge. This process is known as plea bargaining, because the defendant in effect bargains away his right to a trial in return for his guilty plea to a lesser charge, dismissal of counts in his indictment, the promise of probation or a suspended sentence, or the promise of lenient sentencing on the original charge.

For the guilty defendant, there are a number of advantages in bargaining rather than going to trial: usually his time spent in jail before trial will be credited to his sentence, and sometimes he may be released from jail after sentencing without spending any time in a penitentiary. He also avoids counsel costs for trial. If the defendant loses a trial, he may receive a long sentence. Even an innocent defendant is tempted to plead guilty to a lesser charge if he believes he can walk out of jail after sentencing but must remain in jail if he insists on a trial.

Assigned counsel and public defenders encourage guilty clients to engage in plea bargaining. The Public Defender has a large caseload and a small investigative staff at best. He has little time to investigate the defendant's case and prefers to concentrate on capital crimes or cases in which the defendant claims innocence. The assigned

[21] *The Courts*, p. 4; Campbell, *op. cit.*, p. 266.

counsel receives little compensation, is usually not a criminal lawyer, and wants to return to his own practice. He will encourage a guilty plea to end the case. Since the assigned counsel or defender systems represent over half the felony defendants and about one-third of the misdemeanor defendants, plea bargaining is encouraged in most cases.[22]

The prosecutor also gains advantages. He must prosecute a large caseload, and he has fewer resources than he needs. He prefers to concentrate on the more important felony and capital cases. Moreover, the prosecutors want to present a high conviction rate to the public, and guilty pleas provide that rate with little expenditure of resources.

Plea bargaining provides advantages to the judges as well. New York City provides an illustration of the necessity of plea bargaining.[23] Under ideal circumstances, a judge might dispose of 44 felony cases a year with trials. In Manhattan in 1966, there were only nine judges handling felony cases: they could have tried a maximum of 396 cases. Yet there were 4,614 felony cases in 1966 in Manhattan. An additional 100 judges would have been needed to try these cases, not to mention additional courtrooms and court personnel. Without guilty pleas, the criminal justice process in many parts of the country could not function. Judges realize this and encourage guilty pleas by implementing the agreements reached by prosecutors and defense counsel. Sometimes they actively participate when agreements are made.

Plea bargaining also mitigates the severity of the criminal codes enacted by Congress and the state legislatures. It enables the prosecutors and judges to temper justice with mercy, especially when dealing with first offenders.

Plea bargaining also keeps the costs of operating the court and penal system manageable. It permits the system to operate with fewer judges, less personnel, and fewer courthouses. By releasing people after short terms or after sentencing, it keeps the prison population lower, thus lessening the need for additional penitentiaries and personnel.

However, there are problems associated with plea bargaining. There is no certainty for the defendant, since the practice is unofficial and subject to understandings reached with the prosecution and judges. Sometimes these understandings are interpreted differently by the parties involved. On the other hand, defendants guilty of very serious crimes can plead guilty at times to minor offenses. In a recent case in New York City, a man accused of the attempted rape of a baby received a one-year sentence. Innocent defendants may plead guilty to minor charges in order to gain their release from jail. Plea bargaining breeds disrespect for the statutory penalties for offenses, which weakens the deterrent effect of the law.

A system that depends on plea bargaining rather than on speedy trials is susceptible to breakdown. When police make arrests in demonstrations, charges are sometimes dismissed if the protestors demand their right to a jury trial. Plea bargaining reduces the pressure on policy to adhere to constitutional safeguards in making arrests; if cases are not tried, there will be no exclusion of improperly obtained evidence, and the disposition of the defendant will not depend on police behavior in making the arrest.

Improvements in the system have been suggested.[24] The prosecutor and defense could exchange complete information on the case; the prosecutor could publish standards and procedures to standardize the deals he offers; and the judge could preside more effectively over the process.

Another improvement in the system might be non-criminal disposition of cases. Instead

(Continued on page 52)

[22] *The Courts,* p. 56.
[23] Edward J. McLaughlin, "Selected Excerpts from the 1968 Report of New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society, 5 *Criminal Law Bulletin,* No. 6, p. 255.
[24] *The Courts,* pp. 9–11.

Richard M. Pious, an instructor in the department of political science at Columbia University, has written an article, "Politics and Administration, the Case of the Legal Services Program," in *Politics in Society,* May, 1971.

"As fundamental as freedom of the press is to the well-being of society, it was never meant to deny the high value that an open society places upon human life, as manifested in a civilizing system of law which presumes a man innocent until proven guilty beyond a reasonable doubt."

Crime Reporting: From Delirium to Dialogue

By Donald M. Gillmor
Director, School of Journalism, University of Minnesota

Crime reporting in America has put 100 years of free-booting and extravaganza behind it and come into a period of self-doubt and introspective dialogue with the courts. Jazz journalism may have been fun for a reporter, but it was often horror for a defendant. And some of the most acclaimed journalists of their day got in on the fun.

In 1907, Irwin S. Cobb wrote 600,000 words on the sensational Harry K. Thaw murder trial for the New York *Evening World*. Thaw had shot Stanford White in a restaurant atop Madison Square Garden because White, a successful architect, had dared to shower favors on Thaw's beautiful wife before her marriage. William Bolitho, correspondent for the *Manchester Guardian* and the New York *World* and a renowned stylist, shocked the nation in 1919 with accounts of the Paris trial of Henri Landru, better known as Bluebeard, who was accused of murdering an indeterminate number of paramours, fiancés and wives.

With a susceptible mass audience at his disposal, Ben Hecht covered Chicago in the roaring 1920's. In the first year of that decade a war hero named Carl Wanderer was executed for murdering his wife after a celebrated trial which Hecht and the Chicago *Daily News* had helped bring about. Wanderer, who had displayed bravado and scorn during the trial, sang a popular song as the noose was being adjusted over his head. This moved Alexander Woolcott to whimsy and he wrote, "From one of the crowd of reporters watching the execution came the audible comment that Wanderer deserved hanging for his voice alone."[1]

With similar levity Hazel MacDonald of the Chicago *Evening American* began a shocking story about an Owensboro, Kentucky, open air hanging with the paragraph:

> Rainey Bethea, Negro, 22 years old and skinny, dropped to his death here at sunrise today as 20,000 cheering fans packed every available spot of space to see the hangman, attired in a white seersucker suit, spring the trap.[2]

"A big murder trial," wrote Damon Runyon, that great improvisator of language, "possesses some of the elements of a sporting event." He continued:

> I find the same popular interest in the murder trial that I find . . . on the eve of a big football game, or a pugilistic encounter, or a baseball series. There is the same conversational speculation on the probable result, only more of it. . . . The trial is a sort of game, the players on the one side the attorneys for the defense, and on the

[1] Louis L. Snyder and Richard B. Morris (eds.), *A Treasury of Great Reporting* (New York: Simon & Schuster, 1962, 2nd ed.), p. 377.
[2] Quoted in Curtis D. MacDougall, *Newsroom Problems and Policies* (New York: Dover, 1963), p. 385.

other side the attorneys for the State. The defendant figures in it merely as the prize. [3]

Runyon may have been at his best in covering the trial of Al Capone for income tax evasion in 1931, and one of those stories began, "Capone was quietly dressed this morning, bar a hat of pearly white, emblematic, no doubt, of purity."[4]

In an April, 1927, International News Service report, Runyon said of the Ruth Snyder-Judd Gray murder case, a case celebrated for its sheer banality, "It was stupid beyond imagination, and so brutal that the thought of it probably makes many a peaceful, home-loving Long Islander shiver in his pajamas as he prepares for bed."[5] (Mrs. Snyder and Gray had conspired successfully to kill Mr. Snyder.)

Journalistic history was made when a New York *Daily News* photographer strapped a tiny camera to his leg, smuggled it into Sing Sing's execution chamber, and took a picture of the same Ruth Snyder straining at the thongs of the electric chair moments after the current had been turned on. The picture was a front-page sensation, which sold 250,000 extra copies; but there were doubts about its ethical attributes. Stanley Walker, then city editor of the *New York Herald Tribune,* contended, "The Ruth Snyder picture is regarded by men who take news pictures as perhaps the most damaging blot upon their professional history. There is a strong sense of honor, an undefined code which forbids shyster practices, even among this group of hard-boiled buccaneers." This concern may have been more in the spirit of lost competition than outraged morality. But even *Editor & Publisher,* more protective than critical of journalistic behavior, regarded this breach of faith with the prison warden as a deceit casting reproach on all American journalism.

Bernarr Macfadden's *Graphic,* nicknamed the "pornographic," promoted the execution in typical fashion:

> "Don't fail to read tomorrow's *Graphic.* An installment that thrills and stuns. A story that fairly pierces the heart and reveals Ruth Snyder's last thoughts on earth; that pulses the blood as it discloses her final letters. Think of it! A woman's final thoughts just before she is clutched in the deadly snare that sears and burns and FRIES AND KILLS! Her very last words! Exclusively in tomorrow's *Graphic.*"[6]

TRADITION OF CRIME REPORTING

This tradition of crime reporting probably began with the Bow Street police reporters in London who by 1820 had discovered that this kind of news, if presented flashily, had mass appeal. Benjamin Day's *New York Sun,* the first successful penny press, specialized in news of crime and violence. Day hired George Wisner, a Bow Street veteran, to cover the courts, and within a year Wisner was co-owner of the paper.[7] That was in 1833.

Charles Dickens was a Bow Street reporter par excellence. When he was not editing his own newspaper, the *Daily News,* he was covering the courts and their abuses. In March, 1846, his newspaper carried a series of articles by Dickens himself attacking the death penalty and its brutalizing effects on the masses.

Crime news contributed to the success of Pulitzer's *World* and its notion of the new journalism and gave momentum to Hearst's *Journal* and its concept of yellow journalism. James Gordon Bennett's *Herald* had no equal in sensational, aggressive, and even fictional crime coverage. So the tabloids of the Jazz Age had a notable genealogy, and prohibition was to become their patron.

Yet even when the sporting theory of justice was at its zenith in the 1920's, crime news seldom occupied more than about five per cent of the total news space. In 1928, Eric W. Allen studied 100 newspapers over a 75-year time span and found a crime news average of 1.4 per cent of total editorial material, this in the face of estimates as high as 50 per cent made by bankers, lawyers, den-

---

[3] Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949), p. 92.
[4] *Ibid.*
[5] Snyder and Morris, *op. cit.,* p. 439.
[6] Helen M. Hughes, *News and the Human Interest Story* (Chicago: University of Chicago Press, 1940), p. 235.
[7] Edwin Emery, *The Press and America* (New York: Prentice-Hall, 1962, 2nd ed.), p. 215.

tists, engineers and college professors he had surveyed.[8] The inflated estimates may suggest a high intensity of readership for flamboyantly displayed news of this kind. A little bit of crime news has always been able to energize large crime-wave impressions.

More recently, a Midwestern community of 100,000 was studied for a two-month period during which 234 persons were arrested and formally charged with criminal offenses. Of these 234 only 39, or 17 per cent, received publicity in at least one of the community's two local newspapers. Over a three-year period, 29 criminal cases were tried before a jury and of these 12, or 41 per cent, were covered by at least one of the newspapers. In both situations, the more serious the crime, the broader the coverage. Five murder trials were reported by both newspapers.

Clifton Daniel, executive editor of *The New York Times,* has noted that in January, 1965, 11,724 felonies were committed in New York City; yet only 41 of these were mentioned in the New York *Daily News,* the most crime-conscious newspaper in the city. Other estimates of the proportion of trials covered have been as low as 2 per cent; but, of course, we need to know more about the extent and type of publicity given to the reported cases.[9] A single case as bizarre as the Charles Manson case can push innumerable less deadly felonies off the front pages of all of the nation's newspapers.

A WATERSHED FOR CRIME REPORTING

As the tragic Sacco-Vanzetti case, best reported by Louis Stark of *The New York Times,* may have sounded the death knell of experimentation in America with genuinely radical politics, at least until the mid-1960's, so the grotesque newspaper and radio coverage of the Lindbergh kidnapping trial may have been a watershed for court reporting in America. Never again would the press descend like vultures upon a defendant without risking the wrath of peers, readers and the court system itself.

As many as 800 newsmen and photographers, among them Edna Ferber, Fannie Hurst, Kathleen Norris, Adela Rogers St. John, Winchell, Runyon and Woolcott, helped turn the tiny town of Flemington, New Jersey, into a midsummer Mardi Gras. They were joined by the great figures of stage and screen, United States senators, crooners and social celebrities, and as many as 20,000 curious nobodies on a single day. One report had it that the jury was seriously considering an offer to go into vaudeville. The small courtroom became a 24-hour news and propaganda bureau spawning headlines such as "Bruno Guilty, But Has Aids, Verdict of Man in Street," and news story references to Bruno Hauptmann as "a thing lacking human characteristics." Robert Benchley's famous February 23, 1935, *New Yorker* report, "Après la Guerre Finie," best caught the magic of the scene:

> They are the correspondents who supplied us with the news that Mr. Wilentz was rivalling Mr. Reilly for the title of "best-dressed lawyer," that Flemington stores were having a run on cameras, that local bars had fixed up a drink of applejack known as The Hauptmann, that a dog named Nellie had become the mascot of the trial, and that the sale of "kidnap ladders" and miniature sleeping suits was progressing nicely. The world is always full of a number of things for these light-hearted reporters, and the metropolitan district is their oyster.

Legal attitudes toward press coverage and publicity-seeking lawyers were forever hardened by the case, and an era of free-wheeling court coverage may have ended with the Lindbergh case in 1937.

The constancy of human nature has assured lawyer-public official-journalist alliances bent on thwarting justice since the Lindbergh case, but such conspiracies have been unable to function with impunity. In the past 35 years there has been an explosion of renewed interest in the possibility of "trial by newspaper," a problem of democracy at least as old as our judicial system. (Chief Justice Marshall took note of extra-legal newspaper comment in a reference to the Alexandria,

[8] MacDougall, *op. cit.,* p. 360.

[9] Thomas E. Eimermann and Rita James Simon, "Newspaper Coverage of Crime and Trials: Another Empirical Look at the Free Press-Fair Trial Controversy," *Journalism Quarterly,* 47: 1 (Spring, 1970), p. 143.

Virginia, *Expositor* in the treason trial of Aaron Burr.)[10]

Case after sensational case has led to soul-searching on the part of press and bar and to the pursuit of constitutional remedies for relieving the stress between the right to a fair trial and the right of a free press. It was not until 1961 that the United States Supreme Court reversed a state criminal conviction solely on the grounds that prejudicial pretrial publicity had made a fair trial before an impartial jury impossible.[11] In 1963, the Supreme Court took similar action when it reversed the conviction of a murder suspect because he had been interviewed in jail by a sheriff, and the filmed interview had been broadcast over a television station. Thousands in the community heard the suspect confess to murder, bank robbery and kidnaping.[12]

The Oswald epic and the subsequent Warren Report kept the fair trial-free press issue on the agenda, although by no means everyone was prepared to accept the commission's conclusions critical of the press. A presidential assassination is an atypical crime and the commission may not have appreciated the depth of public interest in the event. Bradley S. Greenberg and Edwin B. Parker, in their collection of essays and research reports on the assassination, find evidence to support the hypothesis that public fear during the dreadful hours following the President's death was minimized by quick, reassuring news reports. They conclude that "fear and anxiety might have been magnified to the point of hysteria" if news reports had not quickly informed the people that "the functions of government were being carried out smoothly, that there was no conspiracy, and that there was no further threat."[13]

The trial of Jack Ruby was an anticlimax. If the news media were florid and irresponsible, so were Melvin Belli, Ruby's chief counsel for a time, and Judge Joe B. Brown, who presided over the trial. Belli initiated a publicity campaign focusing on a series of autobiographical magazine articles about his client and, while appeals were pending, wrote a book about the case. Judge Brown was working under contract on a Ruby book manuscript while he supervised the trial.

If somehow Oswald and, to a lesser extent, Ruby, were necessary sacrifices to the public interest, Dr. Sam Sheppard should not have been. Here there were no overriding social rights at stake. On trial for the murder of his wife, the young suburbanite was given the full treatment in proceedings reminiscent of the Lindbergh kidnapping trial. Massive and vindictive newspaper coverage and the infusion of sob-sisters and columnists—more typically the comic relief of American journalism—created an atmosphere so potentially prejudicial to the rights of the defendant that the United States Supreme Court had no hesitation in overturning the conviction.

In an opinion reviewing the misbehavior of the press, the presiding judge and attorneys for both sides, Justice Tom Clark wrote:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised . . . with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

[10] *United States* v. *Aaron Burr,* 25 Fed. Cas. 49 (No. 14692g), 1807.
[11] *Irvin* v. *Dowd,* 366 U.S. 717, 6 L.Ed. 2d 751, 81 S. Ct. 1639 (1961).
[12] *Rideau* v. *Louisiana,* 373 U.S. 723, 10 L.Ed. 2d 663, 83 S. Ct. 1417 (1963).
[13] *The Kennedy Assassination and the American Public: Social Communication* (Stanford: Stanford University Press, 1965).

> Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.[14]

The court has indicated in this and other cases that it will judge, using its own non-empirical standards, the point beyond which prejudice must not go in a criminal trial, if a conviction is to remain valid. The fact that a relationship between news coverage and jury verdicts has not been demonstrated—except perhaps for the deleterious effect of a confession—[15] has not deterred the court from making its own subjective probability estimates, and it will no doubt continue to do so. The court has made the same "non-scientific" assumptions about the psychological effects of the camera in the courtroom, as we shall note.

Closely behind the landmark *Sheppard* decision came the report of the American Bar Association's Advisory Committee on Fair Trial and Free Press, better known as the Reardon Report, named for Committee Chairman Paul C. Reardon of the Massachusetts Supreme Court. Like the *Sheppard* opinion, the report spoke primarily to officers of the court, attorneys and police officials, directing that they restrict their communication with newsmen in the trial and pretrial periods. The only recommendation relating directly to the press was that the contempt power be exercised against any person who disseminated extrajudicial statements willfully designed to affect the outcome of a trial or who violated a valid order not to reveal information disclosed at a closed judicial hearing. And the report recommended that preliminary hearings generally be closed.

FEAR OF CONTEMPT

Although press reaction to the report was generally negative, the most telling criticism of it focused on fear of a revival of the judicial power to hold reporters and editors in contempt for what they write in their news columns. After a long and tortuous legal and legislative history this authority was taken away from American judges as the result of a 1941 Supreme Court case involving labor leader Harry Bridges and the Los Angeles *Times,* both of whom had criticized the judicial process while a case was pending.[16] The court declared in this and subsequent cases that the contempt power could be used against out-of-court comment only when such comment created a clear and present danger that justice would be impaired, and the court seemed prepared to make a strong presumption in favor of a free press, as it has done since in cases of libel against public officials and public figures.[17] In other English-speaking countries, the contempt power is still a dreaded weapon against extrajudicial comment; and in those countries judges, police and prosecutors are not dependent upon the goodwill of newspapers for their continuance in office.

If the contempt power was an empty threat against crime and court reporters—except, of course for misbehavior in the courtroom itself—the way officers of the court reacted to the news media after the report's promulgation was not. Many sheriffs and county attorneys, most of whom had not read the report but were aware that lawyers and judges had spoken collectively on the free press-fair trial issue, simply refused to say anything about crime in their communities and for a time there were fears that a new kind of

---

[14] *Sheppard* v. *Maxwell,* 384 U.S. 333, 16 L.Ed. 2d 600, 86 S. Ct. 1507 (1966).

[15] See specifically Walter Wilcox and Maxwell McCombs, "Crime Story Elements and Fair Trial/Free Press," unpublished manuscript, U.C.L.A., Los Angeles, 1967; F. Gerald Kline and Paul Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," *Journalism Quarterly* 43: 113 (1966); Mary Dee Tans and Steven H. Chaffee, "Pre-trial Publicity and Juror Prejudice," *Journalism Quarterly* 43: 647 (1966). For a general review see Walter Wilcox, *The Press, the Jury and the Behavioral Sciences,* Journalism Monographs, No. 9, October, 1968.

[16] *Bridges* v. *California,* 314 U.S. 252, 88 L.Ed. 192, 62 S. Ct. 190 (1941).

[17] *New York Times Co.* v. *Sullivan,* 376 U.S. 245, 11 L.Ed. 2d 686, 84 S. Ct. 710 (1964), and subsequent cases. (See Donald M. Gillmor & Jerome A. Barron, *Mass Communication Law: Cases and Comment* (St. Paul: West Publishing Co., 1969), pp. 250–284.

secret justice would be administered under a kind of "when in doubt say nothing" policy.

FREE PRESS V. FAIR TRIAL

Amid charges of overkill and over-reaction, the free press-fair trial dialogue has moved to the local and state levels. In lieu of secret trials, the contempt power, new laws, or repressive and unilateral court rules, bilateral press-bar councils have been developed in at least a dozen states. Problems of free press and fair trial are now being discussed by both sides and guidelines are being issued for the conduct of lawyers and newsmen. The criminal trial is not quite the game it used to be. One detects at least traces of restraint in the trials of Sirhan Sirhan and James Earl Ray. And Richard Speck, tried for the murder of eight Chicago nurses, was well insulated from potentially prejudicial coverage during the course of his trial in Peoria, Illinois.

In spite of the fact that there is a better understanding between press and bar than ever before on what kind of pretrial and trial information ought and ought not be disclosed, cases involving prominent people, the Chappaquiddick affair, for example, cases as bizarre and irrational as the Manson case, and cases with significant political implications such as the courts martial of Commander Lloyd Bucher and Lieutenant William Calley, and the "political" trials of the Chicago 8 and Angela Davis, lead to extravagances in reporting and to well-devised publicity campaigns that adversary attorneys believe may spell the difference between victory and defeat. The suspense element in such cases titillates the reader, and editors, propelled by long-standing professional norms, know it.

The right to publish inevitably includes the moral responsibility of deciding whether the public interest justifies placing private rights in jeopardy. As fundamental as freedom of the press is to the well-being of society, it was never meant to deny the high value that an open society places upon human life, as manifested in a civilizing system of law which presumes a man innocent until proven guilty beyond a reasonable doubt.

Where the public interest does seem to be overriding, responsible journalists will continue to expose crime and corruption in law enforcement, in government and in the courthouse itself. It would be scandalous if they did not. Pulitzer Prizes have been won for investigations which prosecuting attorneys were loathe to undertake. Herbert Bayard Swope, a gifted journalist and editor of the New York *Evening World*, made an exposé of an alliance between police and the underworld in 1912 one of the great crime stories of all time.

Except for the occasional sensational criminal case, the judicial branch remains the least well covered branch of government. C. P. Corliss, a 20-year veteran police reporter for the Los Angeles *Times* and author of a guidebook for police reporters, says the job is more difficult than he or any of his associates dreamed it would be 20 years ago.

> With the increase of emphasis on civil rights, protest marches, and charges of overzealousness on the part of law enforcement officers, more and more space will be devoted by news media to spot news of this type. Also, there are going to be more barriers placed in the way of gathering facts the public is entitled to know. There is a need for reporters who know how to surmount these barriers despite the trend on the part of some media to educate rather than inform.[18]

INADEQUATE REPORTING

Other observers fear that the orthodox press has failed to deal with the underlying social conditions which produce crime and disorder, to examine white collar crime, to explain why the poor and the black often regard the judicial system with a blazing hatred, and to point out how the law is sometimes used as a bludgeon rather than a means for securing justice.[19] If journalists cannot probe as deeply as Feodor Dostoyevsky and Theodore Dreiser, they can at least tell us more about the social psychology of crime

[18] Newton H. Fulbright, "Police Reporter Jots Down Some Guideposts," *Editor and Publisher*, 103: 15, p. 11, April 11, 1970.

[19] Nathan Blumberg, "The Orthodox Media Under Fire: Chicago and the Press," *Montana Journalism Review*, 12: 1969, pp. 38–60. See also the *Report of the National Advisory Commission on Civil Disorders* (Kerner Report), Chapt. 15, "The News Media and the Disorders."

and the economic and cultural factors which provoke it. And yet the courts have made this difficult. Courtrooms are too small. Reporting facilities are far less adequate than those provided for newsmen by the legislative and executive branches. The standard courtroom is a journalistic closet.

David Grey, a student of the interaction patterns between the press and the United States Supreme Court, notes:

> In fact, it seems somewhat inconsistent for the Court to talk about such First Amendment rights as freedom of the press as an essential part of democratic dialogue and yet discourage efforts at improved public insight into the Court itself and the workings of law.[20]

The court could modify its procedures to effect a better comprehension of its momentous activities and courts down the line could follow those cues. The press itself could do much to make its coverage more interpretive, more systematic and less dependent upon news formulas suitable, perhaps, for covering the police beat but inadequate for a complex court of law.

TELEVISION COVERAGE?

Yet the courts are reluctant to open themselves to the public gaze. Chief Justice Warren Burger will not permit live television coverage of his public addresses, and this reflects the general unwillingness of the courts to recognize the broadcast media as part of the legitimate press.

This attitude goes back to the Lindbergh case, after which the American Bar Association adopted Canon 35 of its Judicial Ethics barring photography of any kind in the courtroom. All states, with the exception of Colorado, Oklahoma and Texas, have adopted Canon 35, or some modification of it, by statute or court rules. Rule 53 of the Federal Rules of Criminal Procedure keeps cameras out of federal courtrooms. The Supreme Court in the landmark Billie Sol Estes case certified Canon 35, arguing that prejudice is inherent in a televised trial, that the camera has immeasurable but certain psychological effects on jurors, witnesses, the trial judge and on the defendent himself. Television causes prejudice, Justice Clark said categorically in his opinion for the court, although "one cannot put his finger on its specific mischief."[21]

Aside from the empirical question of effects which has not yet been answered, does television coverage of a trial necessarily imply a morbid public interest, an interest former Chief Justice Earl Warren identified with Cuban Premier Fidel Castro's stadium trials and the Soviet Union's trial of U-2 pilot Francis Gary Powers in a huge auditorium? Could a wider public ever manifest a sincere interest in criminal procedures, or would the carnival atmosphere of Flemington, New Jersey, be recreated?

It is safe to say that we do not know and, furthermore, that news photographers have a fairly bad track record. Television, with its complex of sponsors, producers, directors, actors, makeup men, sets, special effects, time slots and ratings might very well turn a celebrated criminal case into a television spectacular. A courtroom is not a stage. Witnesses, lawyers, judges and juries are not players. A trial is not a drama for public entertainment. And yet the public business is being conducted.

In Denver, Colorado, last year an entire trial was televised with the permission of the defendant, a Black Panther leader who was charged with resisting arrest. An edited version of the film was shown over National Educational Television stations on four consecutive evenings with expert commentary by a Harvard Law School professor. The result was a rare view of how a criminal trial proceeds, with no apparent prejudice to the defendant who, upon being acquitted by a white jury, damned the court system generally for what he perceived to be its racism.

In the *Estes* case, Justices Potter Stewart, Hugo Black, William J. Brennan and Byron R. White dissented partly because they would give some latitude to television's future role and partly because they could find no demon-

[20] David Grey, *The Supreme Court and the News Media* (Evanston: Northwestern University Press, 1968), p. 140.

[21] *Estes* v. *State of Texas*, 381 U.S. 352, 14 L.Ed. 2d 543, 85 S. Ct. 1628 (1965).

strable prejudice to Estes in the fragmentary television coverage of his trial and preliminary hearing. Speaking for the minority, Justice Stewart said that:

> it is important to remember that we moved in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing a *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

Justice John Harlan, although he voted with the majority, wrote a key opinion which kept the *Estes* case from becoming a blanket constitutional prohibition against televising state criminal trials. He argued that:

> we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtroom may disparage the judicial process.

One need not be a visionary to imagine the day when video tape will supplement the reporter's notes and provide appellate courts with "living" records of important trials. Unobtrusive camera and recording equipment will be built into the courtrooms of tomorrow as it has been built into the chambers of the United Nations building today. The new Criminal Courts Building in Los Angeles is already so equipped. And, in the long run, the camera may prove to be a more accurate recording instrument than the pencil and pad.

Another significant theme in the press-bar dialogue has been the newsman's privilege to protect his sources of information. In the absence of any common law right, at least 16 states have passed laws shielding newsmen from governmental inquisitions. Most of these laws are absolute or unconditional; a few qualify the privilege by extending to the courts the ultimate determination as to whether justice, and thereby the public interest, demand the information sought. Federal courts do not recognize the privilege and in recent years federal judges have been prone to issue subpoenas demanding tapes, notes, and other raw materials of the reporter's trade, especially where grand juries are investigating the activities of political groups like the Panthers and the Weathermen.

Some news media, among them the most prominent, have cooperated with the courts and with law enforcement agencies as well. Individual newsmen have admitted being on F.B.I. and C.I.A. payrolls for the primary purpose of political prying, a form of moonlighting not considered within the journalist's professional code. Either kind of cooperation may be destructive of the press' credibility as an honest broker between polarized elements of society.

There are also documented cases of police officers impersonating newsmen, suggesting that the two roles may be reversible more frequently than one would like to think, and shattering the validity of journalistic cries for protection against other forms of governmental intrusion and harassment. Underground newspapers have always assumed that the "straight" press prints only the police versions of crime news; and periodicals published by activist reporters are asking searching questions about the performance of the commercial press in some of our larger cities.

Not until Earl Caldwell, a black *New York Times* reporter, refused to honor a subpoena directing him to testify before a grand jury in San Francisco investigating the Black Panthers did the media begin to see their obligation to independence in a clearer light. A federal district court judge in California subsequently ruled that Caldwell, although he was required to respond to the subpoena, was under no compulsion to testify, under the rubric of the First Amendment, unless an overriding national interest, which could

(Continued on page 51)

Donald M. Gillmor is the author of *Free Press and Fair Trial* (Washington, D.C.: Public Affairs Press, 1966) and *Mass Communication Law: Cases and Comment* (St. Paul: West Publishing Company, 1969). He is a contributor to academic journals and law reviews on subjects having to do with the law as it applies to mass media and the study of media as social institutions.

"American correctional theory and practice are undergoing significant changes, among them being a rapidly dwindling confidence in the traditional prison as an appropriate setting for rehabilitation and a growing sense that imprisonment is not only futile but unjust."

Is the Prison Becoming Obsolete?

By Ralph W. England, Jr.
Professor of Sociology, University of Rhode Island

After 150 years of dubiously useful existence, the traditional state prison may at last be sliding into the junkyard of history where, beside such quaint admonitory devices as stocks and pillories, public gallows, ducking stools, and whipping posts, it richly deserves a place.

State prisons should not be confused with jails, houses of correction, county farms, and other establishments where *misdemeanants* serve their relatively short terms—generally less than one year—under county or city authority. State prisons (institutions nowadays hardly distinguishable from penitentiaries and reformatories, although the historical roots and original purposes of the three have been different) are used for confining *felons* convicted of violating those portions of a state's penal code the prescribed penalties for which usually range upward from not less than one year's imprisonment. While the jail's origins extend back seven centuries, the felony prison has existed a scant two hundred years, and the American version of it has been extant since about 1820, when Auburn prison began to reach its stride.

DUAL FUNCTIONS

During the first century of their existence, prisons were expected to perform the dual functions of extracting retribution from persons sentenced to them through deprivation of liberty under stern, even arduous, conditions, and of deterring potential wrongdoers by standing as reminders of the fate awaiting trespassers against the law. Toward the beginning of their second century (about the late 1860's), a third function of prisons came to be widely advocated—that of positively reforming prisoners, eventually giving prisons the triple responsibility of punishing, deterring and rehabilitating. The addition of this third duty as a proper aim of imprisonment was followed by the gradual installation in prisons of "treatment" personnel: instructors and specialists in academic and trade training, religion, calisthenics and close-order drill; in the twentieth century these were supplemented by social workers, psychologists, psychiatrists and recreational directors.

Meanwhile two important alternatives to the use of imprisonment appeared. *Parole,* introduced from Ireland and first used for Elmira Reformatory prisoners after that institution opened in 1876, allowed the supervised release of prisoners into free society for a final portion of their sentences. *Probation,* spreading from Massachusetts after its first legislative authorization there in 1878, permitted judges to release selected convicted felons directly to the community under the supervision of court officers, thereby avoiding prison entirely. Probation and parole, now widely established in legislation and use, have the obvious effect of keeping prison populations below levels they could otherwise reach;

and expansion or contraction in the use of these measures could, of course, reduce or increase prison populations.

It is my opinion that we are now witnessing the beginning of an era in which such expansion, together with the broadened use of newer alternatives to prison, will drastically reduce our prison populations, eventually emptying them of all but a handful of irremediable offenders who will be incarcerated in small, highly specialized institutions. Several recent developments in American society are contributing to this movement, not the least of which is the demonstrable failure of the traditional prison.

A ROADBLOCK TO REHABILITATION

Ironically, the addition a century ago of reformation as a third goal of imprisonment introduced a numerical basis for measuring the effects of imprisonment. As long as the prison's missions remained in the transcendental (and hence immeasurable) realms of extracting retribution and of being an object lesson to the general populace, the effectiveness of prisons could not yield to scientific testing. But once it was agreed that imprisonment should result in the avoidance of further wrongdoing by released inmates, a more or less practical means existed for determining its effectiveness; it was possible to find out what proportion of released prisoners committed further crime. Without reviewing the hundreds of recidivism studies made in this country alone during the last several decades (such studies scarcely existed before 1920), the mounting consensus among students of the traditional prison is that this institution has persistently had such woefully limited success in meeting its obligation to reform its inmates that hope for its ever being able to do so is rapidly dwindling.

There is reason to believe that the traditional prison generates the cause of its own failure. A series of sociological findings accumulating since the 1930's have shown that prisoner populations tend to evolve a set of attitudes and beliefs that operates as a roadblock to rehabilitative prison efforts.[1] Condemned and rejected by society for crimes of sufficient seriousness to result in penal incarceration, prisoners have a choice either of accepting such rejection as their deserved lot, or of protecting their egos by denying the validity of society's judgment. Many prisoners, eager for the psychological comforts provided by the latter choice, succumb to it. This "rejection of the rejectors," as one ex-warden has phrased it,[2] is expressed outwardly by proclamations of crookedness among police, prosecutors, lawyers and judges, charges of incompetence on the part of prison staff, and the like. Elaborate folklores "proving" these claims become part of the prisoner culture and are passed along to incoming inmates.

INHERENT INTERFERENCE

Interference with rehabilitation inheres in this defense mechanism because to accept the prison's reformative programs would be tacitly admitting the correctness of society's hurtful condemnation; but derogatory beliefs about the authorities sustain a conviction that it is society, rather than the prisoners, which is out of line. The embracing of such self-protective beliefs is linked also with traffic in rationalizations for renewed criminality ("everyone has his racket"), admiration of notorious criminals, and the transmittal of actual techniques for profitable law-breaking, all of which are contained in the culture comprising the sub-world of the prisoner. Insofar as immersion in this world provides protection against the pains of guilt and remorse, it is the rare staff member who can rescue a prisoner from it.

A fundamental—and probably crippling—paradox is thus presented to prison administrators by the phenomenon of "rejecting the

[1] Three excellent examples of these studies are: Donald Clemmer, *The Prison Community* (Boston: Christopher Publishing House, 1940), now available in paperback (New York: Rinehart and Company, 1958); Gresham M. Sykes, *The Society of Captives* (Princeton: Princeton University Press, 1958); Richard A. Cloward, *et. al., Theoretical Studies in Social Organization of the Prison* (New York: Social Science Research Council, 1960).

[2] Lloyd W. McCorkle and Richard R. Korn, "Resocialization within Walls," *Annals of the American Academy of Political and Social Science*, May, 1954, pp. 88–98.

rejectors": having long since abandoned as inhumane the oppressive isolation policies of our earlier prisons (the rule of total silence in Auburn-type prisons and of perpetual solitary confinement in the Pennsylvania system), and subscribing to the doctrine that rehabilitation can only be accomplished if prisoners are permitted to dwell together under conditions approaching those of normal sociability, the prisoners have ample opportunity verbally to perpetuate negative attitudes toward authority, these attitudes in turn obstructing rehabilitation.

PRISONS AND SOCIAL CONSCIENCE

A curious but little noted trend in yearly prison population counts has been occurring since at least 1939 and seems recently to have accelerated. Despite a rapidly growing general population and a seeming increase in serious crime, the number of state prisoners expressed as a rate per hundred thousand of the civilian population has shown very little growth since a low of 86.5 was reached in 1945 (down from 122.0 in 1939). In five-year intervals beginning with 1940 the rates were:[3]

1965	98.6
1960	105.7
1955	101.1
1950	98.9
1945	86.5
1940	117.3

As to absolute numbers: the smallest number of state prisoners in recent times was 114,317, reached in 1944; thereafter began a nearly steady climb to a high of 196,453 in 1961. But relative to the general population increase, as shown by the column of figures above, the climb was far from precipitous, and shows no signs of again approaching the 1939 rate of 122.0.

More remarkable, however, has been the prison population trend since 1961. Not only have rates been falling steadily, but *absolute numbers* have declined as well, an extraordinary and unexpected development. Below are end-of-year state prison population counts and the corresponding rates from 1961 through the latest year for which these data are available, 1967:[4]

1967	175,317	89.2
1966	180,409	92.8
1965	189,855	98.6
1964	192,627	101.2
1963	194,155	103.1
1962	194,886	105.3
1961	196,453	107.8

EMPTYING THE PRISONS

What is happening? With no lack of candidates for imprisonment, how is it that during the last 27 years only a rather feeble "recovery" was made from the low point reached in World War II, and that an actual decline in absolute numbers of prisoners began after 1961? It is my guess that judges and other sentencing authorities, and parole boards, reacting to growing evidence that prisons are not achieving useful social ends, have begun, in effect, to empty the prisons, and that this loss of confidence in prisons has been accentuated more recently by a growing awareness of the essentially discriminatory nature of imprisonment.

A black militant group recently "demanded" the release of all Negro prison inmates on grounds that they were "political prisoners," and that their incarceration represented only another aspect of their economic and social oppression in a racist society. This interpretation of Negro imprisonment, while less wildly off the mark than it first seems, errs in failing to recognize that such imprisonment is primarily adventitious rather than racist. It is the case that our agencies of justice (as is true in nearly all countries) so operate as to imprison selected social segments of wrongdoers coming to the attention of law enforcement bodies. Usually these segments are disproportionately male, young, single, from the lower rungs of the socio-

[3] U. S. Department of Justice, *National Prisoner Statistics Bulletin,* No. 44 (July, 1969), Table 1, p. 8. All population counts quoted are as of December 31 in the years indicated.

[4] *Ibid.* The federal prison population similarly peaked at 23,944 in 1962, declining to 19,579 by 1967.

economic ladder, sketchily educated and, in the United States, South Africa, and Rhodesia, black.

The imprisoned segments are not representative of "criminals" in general, for the commission of crime is not limited to persons having these social characteristics. Felony offenders who are older, married, better-educated whites (or Negroes) from more affluent social strata are more likely to be fined, given suspended sentences, or placed on probation than to be imprisoned. Such preferential treatment is not necessarily evidence of prejudice or discrimination; offenders receiving lesser penalties than imprisonment are more likely—as with applicants for bank loans—to benefit from such outward signs of "good character" as being steadily employed and securely married. But I would contend that among the extra-legal influences to which justice agencies—especially sentencing judges—are becoming responsive are those relating to our belated "discovery of the poor" and to concern with broadening the reach of civil and human rights.

PRECEPT VERSUS PRACTICE

A major social development during the quarter-century since the end of World War II has been an awakening of the American conscience to the plight of economically and socially disadvantaged portions of our population. The Supreme Court school segregation decision of 1954 opened the first of several floodgates through which have flowed a disquieting awareness of the enormous gaps which we, as a people, have long tolerated between precept and practice, between social aspirations and their achievement, to the demeaning of large numbers of our citizens. One rapidly emerging awareness is that not only are prisons failing to accomplish their task of rehabilitation, but that those prisoners they are particularly failing are disproportionately drawn from our economic and social minorities and are prisoners partly because of this very minority membership.

The decades of desultory action which have marked our society's approach to the human aspects of our social problems are being supplanted by a positive determination to correct injustices. Among these injustices, along with poverty, inferior educational opportunities, unfair employment practices and the rest, imprisonment under other than constructive conditions, and "correctional" efforts which in too many cases do not correct, must surely be included.

DECLINING PRISONER ISOLATION

A feature of our traditional prisons has been, until recently, the rigorous separation of inmates from the free world. Early prison administrators assumed, perhaps with some reason in those rougher times, that imprisoned felons were inherently dangerous men, bent always on mischief and escape—hence the Bastille-like construction and elaborately militant security measures which characterized their prisons. And this concern for tight security produced an administrative state of mind which dictated that the less contact between convicts and the troublesome potentials of free society, the better. This prompted such measures as severely restrictive visiting rules, close mail censorship, mandatory aversion of inmates' eyes in the presence of touring sightseers, and bland and often out-of-date reading material.

A lesson extremely slow to be learned was that state prisoners of today are far less dangerous than the old myths insisted. Among the consequences of this lesson have been, during the last couple of decades, relaxation in many prisons of the old restrictions on visitors, mail, reading matter, speaking to sightseers and the like. But the walls formerly isolating prisoners from the outside world are being breached in far more important respects. Some of these are described below; they may well portend the coming dissolution of the traditional prison.

"Inmate community talk teams" are now active in about half the states. Small panels of prisoners journey out—often unaccompanied by prison officers—to schools, service clubs and churches where they give talks on crime prevention and prison life and answer questions from their listeners. Because such prisoners are usually among the more articu-

late and presentable of their brethren, this activity should help dispel popular stereotypes about convicts.

Granting "compassionate" furloughs to allow prisoners to attend funerals and to visit critically ill relatives has long been within the power of wardens, providing a guard goes along, but programmed, guardless furloughs serving rehabilitative ends, commonplace in parts of Europe, are new to the American correctional scene. A recent evaluation of California's pre-parole furlough scheme by that state's Research Division should encourage wide adoption of this practice. During the first six months of 1969, 795 prisoners in 13 institutions were allowed furloughs, usually for periods of 72 hours.

NEW EXPERIMENTS

Detailed analyses were made of the leave experiences of 198 male prisoners at the Southern Conservation Center near Los Angeles. Each inmate applying for furlough was required to submit a plan of accomplishments sought (to line up a job, contact a future parole officer, get a driver's license) during his leave. About three-fourths of the men used their time "constructively,"[5] while only three per cent seriously misused it. Although the furlough-ees were a cross-section of California's state prisoners, most with drug or alcohol problems, only two did not return, two returned drunk, and one was arrested for drunken driving.

Supplementing pre-parole furlough with occasional home visits during one's sentence would be a logical extension of the leave concept. Interestingly enough, a majority of wardens polled on these and similar matters support both types of furloughs by respective proportions of 57 and 53 per cent.[6]

The practice of releasing selected felony prisoners during working hours to do paid work for private employers is not new. As early as 1910, inmates from the Massachusetts Reformatory for Women were permitted to go to jobs in a nearby commercial laundry, but while the practice was not then adopted for state prisoners elsewhere, it reappeared in Sweden in 1945 and soon spread to other European countries. North Carolina pioneered work release anew in the United States in 1957; it has spread so rapidly that by 1967 some 28 jurisdictions had authorized it, including congressional approval for the federal prison system and the District of Columbia.[7] Its wide support (65 per cent) among wardens bodes well for its increasing use.[8]

Similar to current European practice, prisoners assigned to work release are usually housed apart from other inmates to reduce possible jealousies and temptations to violate contraband rules. In a typical program, Rhode Island's work release inmates, currently (April, 1971) numbering 38, live off the prison grounds in a remodelled "cottage" formerly used for other state purposes, and daily go to work unattended, traveling as fare-paying public bus passengers. Five prison officers share three shifts at the cottage, where the inmates sleep in a small dormitory and separate bedrooms, to the latter of which their occupants have keys. Nom-

(Continued on page 50)

[5] Norman Holt, *California's Prerelease Furlough Program for State Prisoners: An Evaluation* (Sacramento: Department of Corrections, December, 1969), pp. 17–18.

[6] Albert Morris, "What Do Administrative and Professional Staffs Think About Their Correctional Systems?" *Correctional Research,* Bulletin No. 17, Part One (November, 1967), pp. 28–29. Work-release for misdemeanant prisoners in jails has long been authorized in several states, but has been used extensively only in Wisconsin.

[7] David D. Bachman, *Work-Release Programs for Adult Felons in the United States: A Descriptive Study* (Tallahassee: Florida Division of Corrections, 1968), Table 3, pp. 34–38.

[8] Morris, *op. cit.,* p. 31.

Ralph W. England has been on the faculty of the University of Rhode Island since 1960. He was a United Nations consultant on prison labor (1954–1955), instructed in police training while with the University of Illinois (1955–1960), and is presently active in delinquency prevention and correctional training programs in Rhode Island. The author of numerous articles, Dr. England also has written *Prison Labor* (New York: United Nations, 1955) and, with D. R. Taft, *Criminology* (4th ed.; New York: The Macmillan Company, 1964).

CURRENT DOCUMENTS

McGAUTHA V. CALIFORNIA, MAY, 1971

On May 3, 1971, the Supreme Court handed down a far-reaching decision that capital punishment procedures in general use throughout the United States today do not violate the Constitution. As the summary prepared by the Reporter of Decisions for the convenience of the reader noted, the Court held:

1. In light of history, experience, and the limitations of human knowledge in establishing definitive standards, it is impossible to say that leaving to the untrammeled discretion of the jury the power to pronounce life or death in capital cases violates any provision of the Constitution.

2. The Constitution does not prohibit the States from considering that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment resolved in a single trial than by focusing the jury's attention solely on punishment after guilt has been determined.

Excerpts of the text of the decision follow:

II

Before proceeding to a consideration of the issues before us, it is important to recognize and underscore the nature of our responsibilities in judging them. Our function is not to impose on the States, *ex cathedra,* what might seem to us a better system for dealing with capital cases. Rather it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases. In assessing the validity of the conclusions reached in this opinion, that basic factor should be kept constantly in mind.

III

We consider first McGautha's and Crampton's common claim: that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it.

A

In order to see petitioners' claim in perspective, it is useful to call to mind the salient features of the history of capital punishment for homicides under the common law in England, and subsequent statutory developments in this country. This history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die. Thus, the laws of Alfred, echoing Exodus 21: 12–13, provided "Let the man who slayeth another wilfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwilfully, as God may have sent him into his hands, and for whom he has not lain in wait be worthy of his life and of lawful bot if he seek an asylum." In the 13th century, Bracton set it down that a man was responsible for all homicides except those which happened by pure accident or inevitable necessity, although he did not explain the consequences of such responsibility. The Statute of Gloucester provided that in cases of self-defense or misadventure the jury should neither convict nor acquit, but should find the fact specially, so that the King could decide whether to pardon the accused. It appears that in time such pardons—which may not have prevented forfeiture of goods—came to issue as of course.

During all this time there was no clear distinction in terminology or consequences among the various kinds of criminal homicide. All were *prima facie* capital, but all were subject to the benefit of clergy, which after 1350 came to be available to almost any man who could read. Although originally those entitled to benefit of clergy were simply delivered to the bishop for ecclesiastical proceedings, with the possibility of degradation from orders, incarceration, and corporal punishment for those found guilty, during the 15th and

16th centuries the maximum penalty for clergyable offenses became branding on the thumb, imprisonment for not more than one year, and forfeiture of goods. By the statutes of 23 Hen. 8, c. 1, §§ 3, 4 (1531), and 1 Edw. 6, c. 12,§ 10 (1547), benefit of clergy was taken away in all cases of "murder of malice prepensed." During the next century and a half, however, "malice prepense" or "malice aforethought" came to be divorced from actual ill will and inferred without more from the act of killing. Correspondingly, manslaughter, which was initially restricted to cases of "chance medley," came to include homicides where the existence of adequate provocation rebutted the inference of malice.

The growth of the law continued in this country, where there was rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers. Thus, in 1794, Pennsylvania attempted to reduce the rigors of the law by abolishing capital punishment except for "murder of the first degree," defined to include all "wilful, deliberate, and premeditated" killings, for which the death penalty remained mandatory. This reform was soon copied by Virginia and thereafter by many other States.

This new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of "malice aforethought." Within a year the distinction between the degrees of murder was practically obliterated in Pennsylvania. Other states had similar experiences. The result was characterized in this way by Chief Judge Cardozo, as he then was:

> "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words."

At the same time, jurors on occasion took the law into their own hands in cases which were "willful, deliberate, and premeditated" in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense.

In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact. Tennessee was the first State to give juries sentencing discretion in capital cases, but other States followed suit, as did the Federal Government in 1897. Shortly thereafter, in *Winston* v. *United States*, 172 U. S. 303 (1899), this Court dealt with the federal statute for the first time. The Court reversed a murder conviction in which the trial judge instructed the jury that it should not return a recommendation of mercy unless it found the existence of mitigating circumstances. The Court found this instruction to interfere with the scheme of the Act to commit the whole question of capital punishment "to the judgment and the consciences of the jury." *Id.*, at 313.

> "How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone." *Ibid.*

This Court subsequently had occasion to pass on the correctness of instructions to the jury with respect to recommendations of mercy in *Andres* v. *United States*, 333 U. S. 740 (1948). The case was reversed, however, on the ground that other instructions on the power to recommend mercy might have been interpreted by the jury as requiring them to return an unqualified verdict of guilty unless they unanimously agreed that mercy should be extended. The Court determined that the proper construction was to require a unanimous decision to withhold mercy as well, on the ground among others that the latter construction was "more consonant with the general humanitarian purpose of the statute." *Id.*, at 749. The only other significant discussion of standardless jury sentencing in capital cases in our decisions is found in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). In reaching its conclusion that persons with conscientious scruples against the death penalty could not be automatically excluded from sentencing juries in capital cases, the Court relied heavily on the fact that such juries "do little more —and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.*, at 519 (footnote omitted). The Court noted that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.*, at 519 n. 15. The inner quotation is from the opinion of Mr. Chief Justice Warren for four members of the Court in *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958).

In recent years academic and professional sources

have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959. Several States have enacted new criminal codes in the intervening 12 years, some adopting features of the Model Penal Code. Other States have modified their laws with respect to murder and the death penalty in other ways. None of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty. In recent years, challenges to standardless jury sentencing have been presented to many state and federal appellate courts. No court has held the challenge good. As petitioners recognize, it requires a strong showing to upset this settled practice of the Nation on constitutional grounds. See *Walz* v. *Tax Commission,* 397 U. S. 664, 678 (1970); *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922); cf. *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937).

B

Petitioners seek to avoid the impact of this history by the observation that jury sentencing discretion in capital cases was introduced as a mechanism for dispensing mercy—a means for dealing with the rare case in which the death penalty was thought to be unjustified. Now, they assert, the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The state and federal legislatures which provide for jury discretion in capital sentencing have, it is said, implicitly determined that some—indeed, the greater portion—of those guilty of capital crimes should be permitted to live. But having made that determination, petitioners argue, they have stopped short—the legislatures have not only failed to provide a rational basis for distinguishing the one group from the other, cf. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), but they have failed even to suggest any basis at all. Whatever the merits of providing such a mechanism to take account of the unforeseeable case calling for mercy, as was the original purpose, petitioners contend the mechanism is constitutionally intolerable as a means of selecting the extraordinary cases calling for the death penalty, which is its present-day function.

In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Thus the British Home Office, which before the recent abolition of capital punishment in that country had the responsibility for selecting the cases from England and Wales which should receive the benefit of the Royal Prerogative of Mercy, observed:

> "The difficulty of defining by any statutory provision the types of murder which ought or ought not to be punished by death may be illustrated by reference to the many diverse considerations to which the Home Secretary has regard in deciding whether to recommend clemency. No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion."

The Royal Commission accepted this view, and although it recommended a change in British practice to provide for discretionary power in the jury to find "extenuating circumstances," that term was to be left undefined; "[t]he decision of the jury would be within their unfettered discretion and in no sense governed by the principles of law." Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 553 (b). The Commission went on to say, in substantial confirmation of the views of the Home Office:

> "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is borne out by American experience: there the experiment of degrees of murder, introduced long ago, has had to be supplemented by giving to the courts a discretion that in effect supersedes it." *Id.,* ¶ 595.

The draftsmen of the Model Penal Code expressly agreed with the conclusion of the Royal Commission that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula." The draftsmen did think, however, "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." *Ibid.* The circumstances the draftsmen selected, set out in the Appendix to this opinion, were not intended to be exclusive. The Code provided simply that the sentencing authority should "take into account the aggravating and mitigating

(Continued on page 51)

MAPP V. OHIO, 1961

In 1961, the Supreme Court ruled that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ." and that "There is no war between the Constitution and good sense." The Mapp *ruling considerably widened the protection offered by the government to the accused. The ruling follows in full:*

MR. JUSTICE CLARK *delivered the opinion of the Court.*

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of . . . Ohio's Revised Code. . . .

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, [said the State Supreme Court] "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home" . . . The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice," ' " but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." . . . [Hence, it found that the conviction was valid.]

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf* v. *Colorado* . . . in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." . . .

Seventy-five years ago in *Boyd* v. *United States,* 116 U.S. 616 (1886) . . . , considering the Fourth and Fifth Amendments as running "almost into each other" on the facts before it, this Court held that the doctrines of those Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private liberty. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible

and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

. . . The Court in the *Weeks* case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." . . . Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." (*Wolf* v. *Colorado*. . . .) This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." . . . It meant, quite simply, that conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts. . . ."

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. . . .

In 1949, thirty-five years after *Weeks* was announced, this Court, in *Wolf* v. *Colorado* . . . , again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in the 'concept of ordered liberty' and as such enforceable against the State through the Due Process Clause," cf. *Palko* v. *Connecticut*, 302 U.S. 319 (1937) . . . , and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." . . . The Court's reasons for not considering essential to the right of privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive". . . ; and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." . . . While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins* v. *United States*, 364 U.S. 206 (1960). . . . Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. . . .

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People* v. *Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "the Federal rule as it stands is either too strict or too lax." . . . However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, *Elkins* v. *United States*, 364 U.S. 206, 111; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, *Jones* v. *United States*, 362 U.S. 257, 111 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, *Rea* v. *United States*, 350 U.S. 214, 111 (1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches." But less is not to be expected when dealing with a Constitution, and, at any rate, "reasonableness is in the first instance for the [trial court] . . . to determine." *United States* v. *Rabinowitz*, 339 U.S. 56, . . . (1950).

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

. . . Only last Term, after again carefully reexamining the *Wolf* doctrine in *Elkins* v. *United States* . . . , the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" . . . until the announcement in *Wolf* "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the *Weeks* case. . . . At the same time the Court pointed out, "the underlying constitutional doctrine which *Wolf* established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested. . . ." *Ibid.* The Court concluded that is was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. . . .

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado,* . . . (338 U.S., at 27). This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the right to notice and to a fair public trial including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, . . . and without regard to its reliability. *Rogers* v. *Richmond,* 364 U.S.. 534, . . . (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? . . .

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. . . .

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered." *People* v. *Defore,* 242 N.Y. at 21. . . . In some cases this will undoubtedly be the result. But, as was said in *Elkins,* "there is another consideration—the imperative of judicial integrity." . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its laws, or worse, its disregard of the charter of its own existence. . . .

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

BOOK REVIEWS

READINGS ON THE ADMINISTRATION OF JUSTICE IN AMERICA: PART II

By Karen Dobkin Fortney

Schur, Edwin M. *Our Criminal Society: The Sources of Crime in America.* Englewood Cliffs, N.J.: Prentice-Hall, 1969.

Schwartz, Herman. "Legitimation of Electronic Eavesdropping—The Politics of Law and Order." *Michigan Law Review,* January, 1969.

———. *The Wiretapping Problem Today.* A report by the American Civil Liberties Union, 1965.

Schwartz, Louis B., special ed. "Crime and the American Penal System." *The Annals,* January, 1962.

Scigliano, Robert G., ed. *The Court—A Reader in the Judicial Process.* Boston: Little, Brown, 1962.

Seagle, William. *Men of Law. From Hammurabi to Holmes.* New York: Macmillan, 1947.

"Search and Seizure—A Symposium." *Massachusetts Law Quarterly,* Vol. 54, 1969.

Shawcross, Hartley. "Police and Public in Great Britain." *American Bar Association Journal,* March, 1965.

Sheehan, Neil. "Should We Have War Crime Trials?" *The New York Times Book Review,* March 28, 1971.

Sienkiewicz, Henry. *Portrait of America.* New York: Columbia University Press, 1959.

Silver, David Mayer. *Lincoln's Supreme Court.* Urbana: University of Illinois Press, 1956.

Smith, Adam. *Theory of Moral Sentiments* [1759].

Smith, Bruce. *Police Systems in the United States.* New York: Harper & Brothers, 1949.

Spaniol, Joseph F. *The United States Courts.* Washington, D.C.: Government Printing Office, 1959.

Steffens, Lincoln. *Autobiography.* New York: Harcourt, Brace & Co., 1931.

Stone, Irving. *Clarence Darrow for the Defense.* New York: Doubleday, 1941.

Strickland, Stephen Parks, ed. *Hugo Black and the Supreme Court.* Indianapolis: Bobbs-Merrill, 1967.

Swisher, Carl Brent. *Growth of Federal Judicial Power.* Boston: Houghton Mifflin, 1954.

———. *Historic Decisions of the Supreme Court.* New York: Van Nostrand, 1958.

Sykes, Gresham M. *The Society of Captives.* Princeton, N.J.: Princeton University Press, 1958.

"Symposium: Mr. Justice Douglas: Three Decades of Service." *UCLA Law Review,* June, 1969.

Taft, Donald R. and Ralph W. England, Jr. *Criminology.* 4th ed. New York: Macmillan, 1964.

Tappan, Paul. *Crime, Justice and Correction.* New York: McGraw-Hill, 1960.

Taylor, Jean; Joseph Navarro; and Robert H. Cohen. *Data Analyses and Simulation of the District of Columbia Trial Court for the Processing of Felony Defendants.* Arlington, Va.: Institute for Defense Analyses, 1968.

Taylor, Telford. *Nuremberg and Vietnam: An American Tragedy.* Chicago: Quadrangle Books, 1971.

"The FBI Story." *The New Republic,* April 10, 1971.

The Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York. *Freedom of the Press and Fair Trial.* New York: Columbia University Press, 1967.

Tiffany, Lawrence P.; Donald M. McIntyre; and Daniel L. Rotenberg. *Detection of Crime.* Frank J. Remington, editor. Boston: Little, Brown, 1967.

Tocqueville, Alexis de. *Democracy in America.* New York: Knopf, 1946.

Twentieth Century Fund. *Administration of Justice in the South.* New York: Twentieth Century Fund, 1967.

Tydings, Joseph D. "Ensuring Rational Sentences —The Case for Appellate Review." *Judicature,* August-September, 1969.

Tyler, Gus, special ed. "Combating Organized Crime." *The Annals,* May, 1963.

U.S. National Advisory Commission on Civil Disorders (Kerner Report). Washington, D.C.: Government Printing Office, 1968.

U.S. National Commission on the Causes and Prevention of Violence. Washington, D.C.: Government Printing Office, 1969.

U.S. President's Commission on Law Enforcement

(Continued on page 51)

LAWYER MANPOWER

(Continued from page 12)

very likely to make errors in judgments about important issues, such as whether to plea bargain or whether to go to trial.[17] These are the lawyers to whom citizens of moderate means are likely to go, and because these lawyers are unfamiliar with criminal courts and criminal law, paradoxically, middle class Americans often receive less adequate criminal representation than do the rich or the poor.

"THE CRIMINAL BAR"

A third source of criminal defense, by far the largest, comes from those practitioners known as "the criminal bar" or by some other title like the "criminal court regulars." These attorneys are frequently seen in the magistrate courts at preliminary examinations or in arraignment courts seeking court appointments. They are a heterogeneous group. Most of them are well acquainted with criminal procedure and know the criminal justice system in their community very well. For most criminally accused they provide competent representation. Few of these men earn large incomes and they work long hours handling a lot of cases. In Baltimore, there are six such attorneys who control 90 per cent of the retained work, and 25 more who re-receive most of the court assignments.[18] In Detroit, there are between 50 and 75 full-time criminal defense lawyers who monopolize the practice in recorder's court. Only a few are prosperous and well respected top attorneys. Most are somewhere in the middle; about 15 are police court lawyers, known as "The Clinton Street Bar," at the bottom.[19]

There are those among the criminal bar who will not and cannot adequately represent their clients, and there are those who are "mouthpieces" for organized criminal elements. Some practitioners are dishonest and fail to serve their clients as they should. In cities like Chicago and New York, unethical arrangements with bondsmen, police and court officials do exist. Pay-offs are hardly rare. It is difficult to say how many lawyers fall into these categories. The evidence suggests that they are a small number.

Most criminal lawyers are reasonably competent and reasonably honest and ethical practitioners. Arthur Wood, in his study of criminal lawyers, found that they are more conscious of the weaknesses of the criminal justice system and the needs of the criminally accused than are their civil bar counterparts. They are also more likely to favor measures to remedy the conditions than members of the civil bar.[20] In general, members of the criminal bar are very much like the solo practitioners of the community. They, more often than firm lawyers, have low earnings and come from lower socioeconomic and ethnic minority homes; they less often have college degrees and more often graduate from small local proprietary law schools. Wood concluded that there are two types of criminal lawyers: those who need the work and those who love the work. The former are the least successful practitioners who have found in the minor criminal cases of police and municipal courts a way to make a living.

The real criminal lawyer is the one who loves the drama and identifies with the underdog. Most can be modestly successful. Some become the elite, very successful and sought after criminal lawyers.[21]

A POOR IMAGE

Despite these realities, criminal law has a poor image among lawyers and few attorneys are attracted to it. It has been estimated that there are between 2,500 and 5,000 lawyers who have more than passing experience with criminal procedure and most of these are not

---

[17] J. Edward Lumbard, "The Adequacy of Lawyers Now in Criminal Practice," *Journal of the American Judicature Society*, 47, January, 1964, pp. 176–181.

[18] See Appendix B, President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), pp. 120–138.

[19] *Ibid.*

[20] Arthur L. Wood, *Criminal Lawyer* (New Haven: College and University Press, 1967), Chapter 7.

[21] *Ibid.*, Chapter 2.

full-time criminal law practitioners.[22] They represent only about one, at most two and one-half, per cent of all attorneys in private practice.

In light of the fact that most retained criminal attorneys do not earn large incomes, it seems strange to argue that there is a shortage of criminal lawyers. But none who know the system would claim that there is an abundance. Those criminally accused often seem unable to find competent counsel that they can afford.

ASSIGNED COUNSEL AND DEFENDERS

It is said that anywhere from 50 to 75 per cent of all criminal defendants are indigents.[23] In our major urban centers, the upper figure may be an underestimate. Using figures on inability to make bail, Lee Silverstein estimated, in 1965, that some 150,000 felony defendants were indigent.[24] The United States Supreme Court, in a series of decisions beginning in 1963 with *Gideon* v. *Wainwright* (372 U.S. 335 [1963]) and in 1964 in *Escobedo* v. *Illinois* (305 U.S. 478 [1964]) has ruled that counsel must be provided to indigents charged with felonies at preliminary examinations or at arraignments when these are critical stages in the criminal process. In 1966, in *Miranda* v. *Arizona* (384 U.S. 436 [1966]), the Court held that the accused must be advised of his right to remain silent and to have an attorney when he is held for police interrogation. Under *Miranda,* statements obtained as a result of police interrogation (a guilty plea), are inadmissible at trial, unless counsel has been granted or the right to counsel has been waived.

How does the government provide counsel to indigent defendants? Many communities still do not, except where they are specifically required to do so by the United States Supreme Court. The vast majority of counties, however, use the assigned counsel system. Under this program, the judge assigns counsel at arraignment or earlier. Most counties provide a modest compensation to attorneys representing the indigent accused, but rarely are funds provided for investigation and preparation of the case. In 1964, 2,900 of the 3,100 counties in the nation used assigned counsel programs.[25] The situation has not changed radically over the last five years. In 1970, there were about 120 more counties who had moved toward a more organized defender program for providing counsel to indigents.[26]

The major problems with the assigned counsel system used in the vast majority of counties are, first, that counsel comes too late and has too few resources for working up the case, and second, too often assigned counsel are the young, inexperienced attorneys in the community. There are usually no procedures of rotation, nor is the system handled by the bar association or the courts in an organized manner. In many counties the judge assigns cases to friends or to any attorney who happens to be in court.

DEFENDER PROGRAMS

Defender programs are still small in number, compared to assigned counsel programs. Under the defender system an office is maintained to provide counsel to indigents who qualify under a simple means test. Both judges and defendants are given the opportunity to make early contacts with the office. Under a voluntary defender program an employed attorney will take the case, or attorneys are found by the office who are known to be competent in the case at hand. Under a public defender program a staff lawyer is assigned to the case.

Today, there are about 270 public defender offices in the United States, staffed by about 900 full-time and 200 part-time attorneys

---

[22] Report of the Conference on Legal Manpower Needs of Criminal Law, Airlie House, Va., June 24–26, 1966, an unpublished report to the President's Commission on Law Enforcement and Administration of Justice, quoted in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts,* p. 57.

[23] J. Edward Lumbard, *loc. cit.*

[24] Lee Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (Chicago: American Bar Foundation, 1965), pp. 7–8.

[25] *Ibid.,* p. 15.

[26] National Legal Aid and Defender Association, *Statistics of Legal Aid and Defender Work in the United States and Canada,* 1969, p. 2.

These offices are the official counterparts, for criminal defense, of prosecutors' offices, and are funded with public money. In 53 more communities there are mixed public-private defender programs, or wholly private defender programs. These offices are organized like the public defender offices. Finally, in 41 other communities there are assigned counsel programs or clinics linked to volunteer committees or to law schools.[27] Together there are a total of 364 defender organizations out of a total of 3,100 (county) jurisdictions, which is a coverage of approximately 12 per cent.

PROBLEMS REMAIN

Although defender systems are preferable to assigned counsel programs, they still have problems. Whether fully public or mixed public-private programs, resources and lawyer manpower available to handle the indigent cases are inadequate. In major cities, it is impossible for the defender and his assistants to carry out investigations and research, enter pretrial motions and bargain for the client with the district attorney's office. In New York City, there are 50 defenders to handle over 60,000 cases.[28] They cannot prevent assembly line justice under these conditions. In 1967, 84,200 accused pleaded guilty to misdemeanors in New York. The defender's office represented only nine per cent of them. In the same year, 8,800 were accused, tried and convicted of misdemeanors in Manhattan. The defender's office handled 14 per cent. No less than 75 per cent of these defendants were indigent.[29]

Among the poor in cities like New York, the public defender has a bad image. Inadequate performance in the past and lack of resources and lawyers leave the poor with the view that the defender is not working in their interest. Because the defender's office is usually downtown in the criminal court building, he is often associated with the prosecution rather than the defense. And when the defender meets his client only minutes before he defends him, there are no grounds for raising the confidence of the poor in the system.

Like the prosecutor's office, these problems of time and resources have meant that few attorneys of great qualification are attracted to the post. It is true today that more bright idealistic and action-oriented young law school graduates are attracted to poverty law, but the numbers are still too small to provide a solid base on which to build voluntary or public defender programs.

SUMMARY

We can now return to the questions we asked at the start: how much lawyer manpower enters criminal justice proceedings?

No more than 25 per cent of state and local judges sit in criminal courts.

No more than two and one-half per cent of private attorneys are involved in any criminal practice.

Defenders on public payrolls are no more than five per cent of all attorneys publicly employed at local and state levels.

Prosecutors account for about 25 per cent of state and local employed attorneys.

All told there are an estimated 12,000 lawyers involved in a direct way in the criminal justice process, or about four per cent of the available lawyer manpower in the United States.

The entire criminal justice process, at the federal, state and local level, from police through prosecutors, courts and corrections, claims an annual expenditure of less than five billion dollars.[30] We spend close to that amount each year on outer space alone.[31] The system is seriously under-financed; the number of lawyers necessary to run the system adequately is far too meager; the quality of the lawyer manpower in the system is substantially below the equivalent manpower in the civil law system.

---

[27] *Ibid.*, pp. 2–3.
[28] Lumbard, *op. cit.*
[29] *The New York Times*, March 18, 1968, p. 38.
[30] Ramsey Clark, *Crime in America: Observations on Its Nature, Causes, Prevention and Control* (New York: Simon & Schuster, 1970), p. 107.
[31] Executive Office of the President, Office of Management and Budget, *The United States Budget in Brief, Fiscal Year 1972* (Washington, D.C.: Government Printing Office, 1971), p. 65.

THE PRISON

(Continued from page 39)

inal room and board charges are paid by the prisoners. Minnesota's work release program includes permitting prisoners to spend an occasional weekend at home after satisfactorily completing six weeks' outside work.[9]

Other breaches in the prison's walls include the participation of prisoners in their own and others' rehabilitation,[10] and employment after release in responsible correctional posts.

At the maximum security prison in Walpole, Massachusetts, and the Draper Correctional Center at Elmore, Alabama, selected inmates are planning and preparing various instructional programs in vocational and academic training to be used within these institutions.

Inmates of the Colorado State Penitentiary play host monthly to small groups of young probationers who see first-hand the end result of persistent law-breaking and participate in discussions of their adjustment problems with the prisoners. A similar activity at San Quentin Prison brings in groups of trouble-prone youths 16–19-years-old to exchange thoughts with "experts at failure," as the inmates term themselves.

Until recently it would have been unthinkable that released felons could be employed in any correctional setting in other, perhaps, than menial positions. Today, no fewer than 17 different professional and semi-professional types of posts in correction in some 10 states are occupied by ex-offenders, including prison correctional officers and officer aides, teachers, librarians, industries foremen, parole and probation aides and at least one warden.[11] A presumed advantage of hiring ex-offenders in correction is that they can communicate constructively with offenders undergoing rehabilitation. A still-uncompleted experiment wherein 50 paraprofessional probation officer aides (a portion of whom are ex-offenders) recruited from high crime rate neighborhoods is being conducted by the Federal Probation Office in Chicago. An informal interim report states that "a sizeable number of [aides] have been able to establish positive working relationships with their clients. . . . [T]heir ability to empathize and simply listen have proven to be of obvious benefit to clients."[12]

American correctional theory and practice are undergoing significant changes, among them being a rapidly dwindling confidence in the traditional prison as an appropriate setting for rehabilitation and a growing sense that imprisonment is not only futile but unjust. Prison populations are shrinking as United States agencies of justice, sharing these attitudes, turn to alternate ways of handling offenders. Prison administrators themselves are rethinking their old preconceptions; besides finding their charges to be generally less dangerous and more trustworthy than they have believed, they are adopting rules and programs to reduce the customary isolation of their prisoners from free society. With sentencing agencies reducing the input of prisoners, parole boards granting parole more liberally, and wardens busily kicking holes in their own walls, one foresees the day when the prisoner population will have shrunk to an immutable hard core—perhaps 15 or 20 per cent of present numbers—of unbalanced or dangerously violence-prone inmates requiring long-term preventive detention in small institutions. As that day approaches, the traditional prisons can begin going out of business for good.

[9] Dub Dunlavey, "Work Release in Minnesota," *American Journal of Correction* 31 (July-August, 1969), pp. 28–29.

[10] Albert Morris, "The Involvement of Offenders in the Prevention and Correction of Criminal Behavior," *Correctional Research,* Bulletin No. 20 (October, 1970).

[11] Morris, 1970, *op. cit.,* pp. 18–19.

[12] *Ibid.,* p. 22.

AMERICAN JUDGES

(Continued from page 8)

ing could be interpreted to reflect negative public attitudes concerning the quality of American judges. But it is more plausible to argue that such polls really tap attitudes towards the *quality of justice.* Perhaps it is more fruitful, then, to divert attention from

the effort to assess the quality of judges to the related but distinct consideration of the quality of justice they dispense. Admittedly there are ambiguities and subjectivity in this sort of enterprise, but surely it is more directly related to the central concerns of understanding, evaluating, and reforming a judicial system.

CRIME REPORTING
(Continued from page 34)

not be served by alternative means, could be established to the satisfaction of the court.[22] Legislation has been introduced in Congress which would prohibit governmental bodies from forcing newsmen to disclose their sources of confidential information except where foreign aggression, grand juries or the prevention of libel are involved.

Traditionally, responsible newsmen have been willing to accept contempt citations and thereby to risk fine and imprisonment rather than divulge their sources. A columnist for the New York *Herald Tribune* became a professional martyr in 1957 when she accepted a jail sentence rather than reveal the source of a statement that had provoked a million dollar libel suit by Judy Garland against the Columbia Broadcasting System.

The dialogue with the courts will continue; schools, young journalists and concerned segments of the public will be heard and, except for occasional lapses into the sensational forms of an earlier time and the kind of herd panic that sometimes afflicts newsmen, a more socially responsible level of performance will very likely emerge.

[22] *Application of Caldwell* (N.D. Cal. Misc. No. 10426, 1970).

READINGS ON JUSTICE
(Continued from page 46)

and the Administration of Justice. Washington, D.C.: Government Printing Office, 1967.

U.S. President's Task Force on Prisoner Rehabilitation. Washington, D.C.: Government Printing Office, April, 1970.

Vanderbilt, Arthur T. *Judges and Jurors: Their Function, Qualifications and Selection.* Boston: Boston University Press, 1956.

Walker, Daniel. *Rights in Conflict.* New York: Bantam, 1968.

Waltz, Jon R. "The Burger/Blackmun Court." *The New York Times Magazine,* December 6, 1970.

Weinburg, Arthur. *Attorney for the Damned.* New York: Simon & Schuster, 1957.

Weston, Paul B. and Kenneth M. Wells. *The Administration of Justice.* Englewood Cliffs, N.J.: Prentice-Hall, 1967.

Wilson, James Q. *Varieties of Police Behavior.* Cambridge: Harvard University Press, 1968.

Winters, Glenn R., special ed. "Lagging Justice." *The Annals,* March, 1960.

——— and R. Stanley Lowe, eds. *Selected Readings on the Administration of Justice and its Improvement.* Chicago: The American Judicature Society, 1969.

Younger, Richard D. *The People's Panel—The Grand Jury in the United States, 1634–1941.* Providence, R.I.: Brown University Press, 1963.

Zeisel, Hans. "Court Delay Caused by the Bar?" *American Bar Association Journal,* September, 1968.

———; Harry Kalven, Jr.; and Bernard Buchholz. *Delay in the Courts.* Boston: Little, Brown, 1959.

McGAUTHA v. CALIFORNIA
(Continued from page 42)

circumstances enumerated . . . and any other facts that it deems relevant," and that the court should so instruct when the issue was submitted to the jury.

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

PRETRIAL AND NONTRIAL

(Continued from page 26)

of plea bargains, the defendant and prosecutor might agree to a disposition that would remove the defendant from the criminal justice process entirely. This approach has traditionally been used with defendants of draft age; judges will dismiss charges against first offenders if they promise to enlist in the armed forces. Procedures could be established (as in a New York program) to refer defendants to employment programs, or to social welfare, hospital or other appropriate agencies.[25] Philadelphia is experimenting with a pre-indictment program in which charges are dropped after a six-month compliance with probation conditions set by a magistrate.[26]

CONCLUSION

The system of criminal justice in the lower courts is well on its way to collapse. It provides precious little justice, and tolerates behavior little short of criminal in bail bondsmen. It forces judges, prosecutors and defense attorneys, no matter how interested they are in justice, to engage in practices which provide neither speedy trials nor justice. At best only a rough equity is provided, and that at the cost of the deterrent power of the criminal code.

The crime rate continues to increase, and the professionalization of police forces also continues. Both result in increases in the total number of arrests. Unless the courts revamp their pretrial procedures, the present system will get worse. Defendants will languish in jail for longer periods of time, while some of those freed will commit crimes, thus increasing the pressure for pretrial detention. Plea bargaining, with its attendant problems, will continue to provide the only tolerable means of keeping the system going. The poor, the first offender and the unpopular defendant will continue to suffer the most. Dehumanization of those in the system, as well as those who pretend to ignore it, will continue unabated.

[25] The VERA Institute of Justice, *The Manhattan Court Employment Project* (New York, 1969).
[26] Campbell, *op. cit.* p. 272.

JUDICIAL ATTEMPTS TO CONTROL THE POLICE

(Continued from page 19)

until those in positions of authority insist upon changes in police practices, new tort remedies will be either impossible to develop or ineffective in practice. The major reason for this conclusion is that to rely on state judges and juries to control police conduct involves the assumption that, by and large, those judges and juries share the constitutional values implicit in the development of effective remedies for illegal police behavior. It is an assumption of doubtful validity.

The unresolved question is whether the Supreme Court should reverse itself and do away with the exclusionary rule. Here it may be important to distinguish between the functional and symbolic impact of a rule designed to control behavior. From a functional perspective, the *Mapp* rule may be a failure. It need not follow that the rule should be changed if one can find in it sufficient symbolic worth. The question may be put this way: would reversal of the rule place us in a position that is substantially *status quo ante?*

An apt analogue may be found in our existing adultery laws. They are, as everyone knows, not enforced. But does administrative nullification of those laws carry the same connotation as legislative repeal? Perhaps not. The latter is often interpreted, whether sensibly or not, as expressing approval rather than just a lack of sufficient zeal to try to stop the practice. It has been traditional when discussing the exclusionary rule to pose the question that has been posed here: Does the rule work? But at this point that may be the wrong question. Instead, the central question may now be this: how would police react if the Supreme Court overruled *Mapp. v. Ohio?*

THE MONTH IN REVIEW

A CURRENT HISTORY chronology covering the most important events of May, 1971, to provide a day-by-day summary of world affairs.

INTERNATIONAL

Berlin Crisis

(See also *U.S., Foreign Policy*)

May 7—Following a discussion on making practical improvements in West Berlin, rather than on the status of the city, ambassadors to the 4-power talks express cautious optimism.

Disarmament

(See also *U.S.S.R.; U.S., Foreign Policy*)

May 11—At the disarmament conference in Geneva, Soviet and U.S. representatives, responding to pressure from other members of the conference, agree to sponsor talks by experts on how to verify proposed bans on underground nuclear tests and on chemical weapons.

May 13—The 25-nation disarmament conference in Geneva concludes its winter session; the conference will reconvene on June 29.

May 20—Simultaneous announcements are made in Moscow and Washington, D.C., of a U.S.-Soviet compromise on the framework for talks on controlling strategic arms; emphasis this year will be placed on seeking an agreement to limit "the deployment of antiballistic missile systems." Any such agreement will be coordinated with "certain measures" that would limit the number of some offensive weapons.

May 28—The 4th round of talks on the limitation of strategic arms is concluded in Vienna. According to *The New York Times,* a decision has been reached to turn over negotiations on the limitation of nuclear arms in Central Europe to the full membership of the North Atlantic Treaty Organization and the Warsaw Pact.

European Economic Community (Common Market)

(See also *United Kingdom*)

May 11—The 6 members of the Common Market agree to some special arrangements for the entry of Britain into the E.E.C.

May 13—The foreign ministers of the 6 member countries and the British negotiator, Geoffrey Rippon, resolve 2 issues that have stood in the way of Britain's entry into the organization.

May 21—After 2 days of meetings in Paris, French President Georges Pompidou and British Prime Minister Edward Heath announce that they have reached agreement that should assure the entry of Britain into the Common Market; Ireland, Norway and Denmark are also expected to be successful in their bids for membership.

Middle East Crisis

(See also *Jordan; U.A.R.*)

May 1—U.S. Secretary of State William Rogers arrives in Saudi Arabia and says that the U.S. is willing to play any reasonable and useful role in attaining a lasting peace in the Middle East.

May 2—Following talks with King Faisal of Saudi Arabia, Secretary of State Rogers flies to Jordan to confer with King Hussein.

May 3—After a helicopter flight over northern Jordan, the Jordan Valley and the Golan Heights, Rogers confers with King Hussein and then flies to Lebanon.

May 4—After conferring with Lebanese officials, Rogers flies to Cairo where he is greeted by Egyptian Foreign Minister Mahmoud Riad.

May 5—Riad and Egyptian Premier Mahmoud Fawzi discuss the Egyptian proposals for reopening the Suez Canal with Rogers.

May 6—After a meeting with Egyptian President Anwar el-Sadat, Rogers travels to Israel where he confers with Israeli officials.

May 7—U.S. and Israeli diplomats express optimism on resolving issues in negotiations on reopening the Suez Canal after meetings by Rogers, Israeli Premier Golda Meir, Israeli Defense Minister Moshe Dayan, and U.S. Assistant Secretary of State Joseph Sisco.

May 8—At a news conference in Rome, Rogers says that he has sent Sisco to Cairo to brief President Sadat on "certain clarifications" that emerged in talks with Israeli leaders.

May 9—Premier Golda Meir and Foreign Minister Abba Eban brief the Israeli Cabinet on the meetings with Secretary of State Rogers.

Sisco confers with President Sadat.

May 17—Rogers briefs U.N. Secretary General U Thant and Thant's special representative to the Middle East, Gunnar Jarring, on the result of his trip to the Middle East. Rogers stresses that any accord on the reopening of the Suez Canal would only be an interim step toward a final settlement of the Middle East problem.

Monetary Crisis

May 5—As a result of speculative funds flooding their already swollen dollar reserves, the central banks of West Germany, Switzerland, Belgium, the Netherlands and Austria close their foreign exchange markets and withdraw their support for the U.S. dollar. It is reported that some banks in Switzerland have completely stopped exchanging dollars for other currencies. The speculators are interested in exchanging dollars for West German marks or other strong currencies.

May 9—The West German government decides to let the mark float in relation to the U.S. dollar. The Netherlands and Belgium follow suit; Switzerland and Austria revalue their currencies. The new range for the mark is kept secret by the West German government.

May 10—Official European foreign exchange markets reopen; the mark keeps rising.

May 11—Trading is light in European foreign exchange markets.

May 21—It is reported that the Deutschmark has floated to about 3.5030 marks to the dollar; the dollar is at its lowest value in relation to the mark since the West German government permitted it to float 10 days ago.

North Atlantic Treaty Organization (NATO)

(See also *U.S., For. Pol.*)

May 19—At the conclusion of 2 sessions of the North Atlantic Council, U.S. officials say that the alliance will not insist on a settlement of questions pertaining to Berlin prior to talks with the U.S.S.R. on the reduction of forces in Central Europe. NATO members, however, will not attend a conference on European security proposed by the Warsaw Pact members until a satisfactory conclusion of the current talks on Berlin.

May 28—At the conclusion of a meeting of the Defense Planning Committee, a communiqué is issued indicating that the organization will build up its defenses in the Mediterranean area.

United Nations

(See also *Intl, Middle East*)

May 12—Pakistani President Agha Mohammad Yahya Khan, in a letter to Thant, says that U.N. emergency relief is not now needed for East Pakistan.

May 17—After a meeting with Secretary General Thant, Pakistani officials indicate that they are seeking U.N. help in obtaining food and relief supplies for East Pakistan.

May 21—In a report to the Security Council, Thant warns that tensions between the Greek and Turkish communities on Cyprus are mounting.

May 26—The Security Council votes unanimously to extend the peace-keeping force on Cyprus until December 15.

War in Indochina

May 3—The U.S. State Department confirms that the U.S. has been using B-52 bombers

in attacks on northern Laos in support of the Laotian government.

The U.S. Defense Department acknowledges that allied forces in South Vietnam have destroyed enemy hospitals but contends that the medical facilities were not marked.

White House press secretary Ronald Ziegler says that U.S. President Richard Nixon is pleased with reports in the Swedish press that the Swedish government would be willing to intern U.S. and North Vietnamese prisoners of war. The President calls on the government of North Vietnam to respond favorably to the offer.

May 4—U.S. Secretary of the Army Stanley Resor, at the end of a 10-day review of the Vietnamization program, says that progress in the program is encouraging but that difficulties can be expected because of the pull-out of U.S. troops.

At the Paris peace talks, a North Vietnamese spokesman reiterates that the question of prisoners of war can be dealt with only after the withdrawal of U.S. troops; thus he appears to reject the suggestion that prisoners of war be sent to a neutral country.

May 5—A Laotian government spokesman reports that the North Vietnamese have retaken a town on the Ho Chi Minh Trail after 2 days of heavy fighting.

May 6—At the Paris peace talks, the U.S. negotiators say that there can be no negotiations of total U.S. troop withdrawal without discussion of North Vietnamese withdrawal.

May 9—The 24-hour allied truce in honor of Buddha's birthday ends.

May 10—The U.S. command announces further troop reductions; last week the total number of U.S. servicemen in South Vietnam was 267,100.

May 12—The U.S. command reports that U.S. planes destroyed 13 antiaircraft guns in North Vietnam on May 10.

A Laotian government spokesman reports that North Vietnamese MIG-21 jets attacked government troop positions in the Plaine des Jarres.

May 14—The official press agency of North Vietnam says that North Vietnam has agreed to accept a group of 570 disabled North Vietnamese prisoners of war who are held by South Vietnam.

May 15—According to *The New York Times,* a drive involving 5,000 South Vietnamese troops began in eastern Cambodia on May 11.

May 18—75 per cent of Dong Hene in the southern panhandle of Laos is reported to have been destroyed by North Vietnamese attacks.

May 21—U.S. Senator J. W. Fulbright (D., Ark.), chairman of the Senate Foreign Relations Committee, says that 4,800 Thai troops, financed by the U.S., are fighting in Laos in support of the Royal Laotian government.

May 22—The U.S. command reports that 30 U.S. soldiers were killed in rocket and mortar attacks in the northern war zone of South Vietnam yesterday.

May 31—The South Vietnamese and U.S. commands report that a large number of attacks by North Vietnamese and Vietcong troops in South Vietnam have occurred in the past 2 days. There were at least 54 rocket and mortar attacks. U.S. troops were involved in 5 minor ground clashes.

All but 13 of the 570 disabled North Vietnamese prisoners of war who had been offered repatriation by South Vietnam refuse to return to North Vietnam, according to officials in Saigon.

Reports from the field indicate that North Vietnamese forces have captured the Cambodian town of Snoul from South Vietnamese troops; the town was captured by U.S. forces a year ago.

ARGENTINA

May 12—At least a dozen military officers are reported to be under arrest in connection with what is purported to be a conspiracy against the government of President Alejandro Agustín Lanusse.

May 15—An official announcement is made of the forced retirement of 7 army colonels

who have been implicated in the conspiracy.

May 23—Stanley M. Sylvester, the British honorary consul in Rosario and the manager of the Swift de la Plata meat-packing plant, is kidnapped. A note from the "Revolutionary Army of the People" says that Sylvester will be tried by them.

May 26—The military government announces that the Ministry of Economy is to be reorganized.

May 28—A spokesman for Swift de la Plata announces that $62,500 worth of food will be distributed to the poor by the company in exchange for the release of Sylvester.

AUSTRALIA

May 11—It is disclosed that the Labor party, which leads the opposition to the government of Prime Minister William McMahon, has received an invitation from Communist China to meet in China next month to discuss relations between the 2 countries.

May 13—Prime Minister McMahon outlines proposals for expanding contacts between Australia and China. McMahon also announces that the government has agreed to a request from the Soviet Union to enlarge the number of government representatives it has in Australia.

May 20—Trade Minister John Anthony announces that Australia sold more than $13.6 million in goods to China at a recent trade fair in Canton.

BOLIVIA

May 1—Workers in a May Day parade led by President Juan José Torres cheer the nationalization yesterday of the Matilde lead and zinc mine which was operated by United States Steel and Phillips Brothers, a N.Y. mineral trading company.

BOTSWANA

May 22—According to *The New York Times,* Vice President Quett K. Masire, addressing a white audience, has warned whites living in Botswana to change their racist attitudes or face "drastic action."

CAMBODIA

(See also *Intl, War in Indochina*)

May 3—An agreement is announced in the National Assembly and from the office of Chief of State Cheng Heng that General Lon Nol will serve as the titular Premier of the government while Lieutenant General Sisowith Sirik Matak will function as his delegate; the agreement ends a 2-week crisis during which 4 candidates failed in their attempts to form a government.

May 6—The National Assembly votes approval of the Cabinet presented by General Sirik Matak.

CANADA

(See *U.S.S.R.*)

CEYLON

May 1—The government announces that 250 rebels surrendered today as a 4-day amnesty period begins.

May 3—The government announces that raids by insurgents have increased.

May 4—The government reports that more than 40 insurgents were killed and that more than 1,700 surrendered during the amnesty period which ended today.

May 5—According to *The New York Times,* unofficial sources claim that the Soviet Union is sending 20 armored cars and 2 helicopters to the Ceylonese government.

May 23—Government officials report the surrender yesterday of 89 insurgents in a battle between security forces and the rebels.

CHILE

May 25—In a news conference, President Salvador Allende Gossens criticizes the action of U.S. President Nixon who has asked Congress to raise the authorized ceiling of U.S. arms sales to Latin America from $75 million to $150 million a year.

CHINA, PEOPLE'S REPUBLIC OF (Communist)

(See also *U.S.S.R.*)

May 1—Chairman Mao Tse-tung and his

deputy, Lin Piao, appear at May Day celebrations. Premier Chou En-lai is also present.

May 4—*Jenmin Jih Pao,* the Chinese Communist party newspaper, accuses the U.S. government of interference in the affairs of the Chinese people by continued support of Nationalist China; Peking radio denounces the administration of U.S. President Richard Nixon and his China policy.

May 10—The North Vietnamese Communist party chief, Le Duan, arrives in Peking.

May 23—In an interview preceding their departure for the U.S., 2 U.S. scientists who have been visiting China discuss scientific advances that have been made in China but are unknown in the West.

May 27—*Hsinhua,* the Chinese press agency, announces that representatives of the governments of China and Austria signed an agreement in Rumania yesterday calling for the establishment of diplomatic relations between the 2 countries.

CHINA, REPUBLIC OF (Nationalist)

May 1—The Nationalist Chinese Embassy in Tokyo warns that visas for Taiwan will be cancelled if U.S. citizens also visit Communist China.

CUBA

May 1—In a speech, Premier Fidel Castro, urging Cubans to work harder, acknowledges that low labor productivity is the most serious problem facing his government.

May 23—Havana radio reports the arrival of Juan Enrique Vega, the first Chilean ambassador to Cuba since 1964.

CZECHOSLOVAKIA

May 15—The 3-day congress of the Slovak Communist party meeting in Bratislava concludes.

May 25—Leonid Brezhnev, leader of the Soviet Communist party, is among those attending the opening session of the 14th party congress in Prague; the 14th Czechoslovak party congress, which had originally been scheduled for September, 1968, was cancelled as a result of the August, 1968, invasion by the Warsaw Pact nations.

May 26—Addressing the 14th party congress, Brezhnev warns of the need for socialist states to stand together against enemies at home and abroad.

May 29—At the final session of the 14th party congress, Gustav Husak is reelected head of the Czechoslovak Communist party.

FRANCE

(See also *Intl. E.E.C., U.S.S.R.*)

May 7—In France on a 4-day visit, Tran Van Lam, South Vietnam's foreign minister, says that he will submit a proposal to French Foreign Minister Maurice Schumann to reestablish diplomatic relations.

GERMANY, DEMOCRATIC REPUBLIC OF (East)

May 3—Walter Ulbricht resigns his post as First Secretary of the Central Committee; Erich Honecker is named to succeed him. Ulbricht will retain his post as chairman of the State Council and remain head of state.

GERMANY, FEDERAL REPUBLIC OF (West)

(See also *Intl, Monetary Crisis*)

May 13—Finance Minister Alex Möller resigns from the Cabinet; Economics Minister Karl Schiller is appointed minister of economics and finance. The resignation is attributed to disputes over the budget.

GREECE

May 6—It is officially announced that Greece and Albania have agreed to resume full diplomatic relations.

INDIA

(See also *Pakistan*)

May 13—President V. V. Giri signs an ordinance providing for the government to take over the management of all private general insurance companies in India, including 42 foreign companies.

May 24—Speaking in Parliament, Prime

Minister Indira Gandhi calls on the big powers to settle the crisis in East Pakistan and to aid in the refugee problem; she says that 3.5 million people have fled East Pakistan in the last 2 months.

ISRAEL

(See also *Intl, Middle East*)

May 16—Abdul Aziz el-Zuabi is named deputy to the health minister; he is the first Arab to be named a deputy minister in Israel's history.

May 18—Oriental Jews battle with police in Jerusalem for 6 hours, protesting what they call ethnic discrimination.

ITALY

May 2—Speaking at a symposium, Carlo Donat Cattin, minister of labor and social welfare, and other Christian Democrats call for constructive discussion with the Communist party.

May 9—U.S. Secretary of State Rogers departs for Washington, D.C., after a one-day visit to Rome on the way home from the Middle East; his visit to Rome resulted in violent demonstrations between local Communist organizations.

May 11—A majority of Rome's municipal workers vote to return to work after a 6-day strike.

May 17—Foreign Trade Minister Mario Zagari heads a 74-man economic delegation leaving for Communist China today.

JORDAN

May 22—In a letter to Thant, Jordan protests the deportation of Jordanians from territories occupied by Israel since the June, 1967, war and Israeli treatment of Jordanians.

May 29—Palestinian guerrillas in Lebanon charge that the Jordanian army has attacked guerrilla bases about 25 miles north of Amman.

KOREA, REPUBLIC OF (South)

May 14—Military spokesmen report that South Korean planes sank a North Korean spy boat today.

May 29—*The New York Times* reports that the Democratic Republican party of President Chung Hee Park has won 113 seats in the enlarged 204-member National Assembly; the opposition New Democratic party won 89; 2 splinter parties won 1 seat apiece. The general elections were held on May 25.

LAOS

(See also *Intl, War in Indochina*)

May 11—North Vietnamese diplomats who walked out on a speech by Laotian Prince Souvanna Phouma (in which he was denouncing the North Vietnamese government for having sent troops into Laos) are attacked by Laotian government soldiers and police.

PAKISTAN

(See also *Intl, U.N.; U.S., Foreign Policy*)

May 1—A government announcement says that Pakistan will ask creditor nations for a 6-month moratorium on payments of debts.

May 3—In a note to the Indian High Commissioner in Islamabad, the Pakistani Foreign Office charges that Indian border units have fired into East Pakistan; Pakistan also accuses India of having sent 2 fighter planes over East Pakistan in violation of her airspace.

May 5—Major General Mohammad Akbar Khan, chief of Pakistan's military intelligence service, says that India has moved large military forces along the East Pakistani border.

May 6—The military governor of East Pakistan, speaking to the first group of foreign newsmen granted permission to enter East Pakistan since late March, says that reports of casualties in East Pakistan have been grossly exaggerated.

May 9—*The New York Times* reports that virtually all serious armed rebellion in East Pakistan has ceased.

May 15—The government announces that Communist China will grant an interest-free loan amounting to about $207 million to Pakistan.

POLAND

May 2—Wladyslaw Gomulka, former Polish Communist party leader, resigns from the Council of State, the country's nominal ruling body.

SAN MARINO

May 7—A communiqué is issued saying that diplomatic relations at the consular level will be established with Communist China.

SAUDI ARABIA

(See *U.S., Foreign Policy*)

SOMALIA

May 5—The ruling Revolutionary Council announces that it has thwarted an attempted coup d'etat and has arrested 2 of the Council's members as leaders of the conspiracy.

SWITZERLAND

(See also *Intl, Monetary Crisis*)

May 9—The Swiss Cabinet revalues the Swiss franc upward from 4.3 to the U.S. dollar to 4.08 to the dollar.

THAILAND

May 13—Foreign Minister Thanat Khoman announces that prospects for a "real dialogue" between Communist China and Thailand have developed as the result of feelers by third parties; the government tells all government radio stations to stop their propaganda broadcasts against China.

TRINIDAD

May 25—The results of yesterday's elections, in which only 40 per cent of the electorate voted, are announced; the party of Prime Minister Eric Williams, the People's National Movement, won all 36 seats in Parliament for the 4th consecutive time. The opposition group, the merged Action Committee of Dedicated Citizens and the Democratic Labor party, had called for a boycott of the elections.

TURKEY

May 1—Premier Nihat Erim promises to remove Turkish opium from the market by licensing poppy cultivation and buying the entire 1971 crop; substitute crops will be introduced.

May 17—The Turkish People's Liberation Army, an organization of leftist terrorists, claims responsibility for the kidnapping today of the Israeli Consul General, Efraim Elrom. The group demands the release of all "revolutionaries" in jail in Turkey; May 20 is given as the deadline for meeting the terrorists' demands.

May 23—Police and army forces search for the kidnappers of Elrom, whose body was found today.

May 31—Two young men, believed to be implicated in the kidnapping and murder of the Israeli Consul General, reportedly have offered to exchange the daughter of a Turkish army major, whom they adducted yesterday, for their safe conduct out of Turkey.

UGANDA

May 1—In a May Day speech, General Idi Amin, the President, announces that the government will curtail the programs of ousted President Milton Obote which were aimed at the nationalization of industry and commerce.

May 13—The government offers a reward of $139,200 for the live return of former President Obote; rewards are also offered for the return of 2 of Obote's supporters.

U.S.S.R.

(See also *Intl, Disarmament; U.A.R.; U.S., Foreign Policy*)

May 4—According to *The New York Times,* Soviet officials have told U.S. diplomats that they have been ordered to try to negotiate agreements with the U.S. seriously.

May 7—A communiqué, issued at the conclusion of the visit of French Foreign Minister Maurice Schumann to Moscow, says that in October or November, the "Soviet side" will return last fall's visit of French President Georges Pompidou; French sources indicate that Leonid Brezhnev, General Secretary of the Soviet Com-

munist party, will lead a delegation to France.

The U.S. Embassy announces that Duke Ellington, a U.S. jazz musician, and his orchestra will tour Soviet cities beginning in September; the arrangement is part of the Soviet-U.S. cultural exchange program.

May 14—In a speech, Brezhnev calls on Western powers to begin exploratory negotiations on the reduction of troops and armaments in Central Europe.

May 18—Premier Aleksei Kosygin says that the U.S.S.R. will do everything possible to achieve a reduction of troops in Europe if the Western powers will take positive steps in that direction.

May 19—In Moscow, Canadian Prime Minister Pierre Elliott Trudeau and Kosygin sign an agreement providing for closer ties between the 2 countries to improve "friendship, good-neighborliness and mutual confidence."

May 20—In Leningrad, 9 Soviet Jews are found guilty of organized anti-Soviet activity and are sentenced to prison camps for terms ranging from 1 to 10 years.

May 21—*Tass,* the Soviet press agency, reports that the Soviet delegates to the 19-month-old border talks with China have completed a tour of Chinese cities as guests of the Chinese government.

May 27—*Tass* reports that the Latvian Supreme Court has found 4 Jews in Riga guilty of anti-Soviet activity and sentenced them to terms ranging from 1 to 3 years.

May 28—Following a meeting with President Aleksei Kosygin in Moscow, Chilean Foreign Minister Clodomiro Almeyda, at a news conference, says that he has concluded agreements with the Soviet Union for the expansion of trade; he intends to expand contacts with the Council for Mutual Economic Assistance and to "study the possibilities of cooperating with that organization."

UNITED ARAB REPUBLIC

(See also *Intl, Middle East Crisis*)

May 2—The official Middle East News Agency announces that Vice President Aly Sabry, one of 2 Vice Presidents, has been removed from office by President Anwar el-Sadat.

May 13—Six members of the Cabinet resign. Three officials of the Higher Executive Committee of the Arab Socialist Union, Egypt's only political organization, also resign. President Sadat names Mamdouh Salem as the new Minister of Interior and issues a decree ordering an end to security police surveillance of citizens and a ban on the tapping of telephones except in special circumstances.

May 14—President Sadat announces the members of his new Cabinet and says that an attempted coup d'etat caused the resignations from his government; Sadat reports that the ousted government members are under house arrest.

May 16—It is reported that Sadat has removed the minister of communications and has appointed Abdel Malek Saad to the post.

May 25—Soviet President Nikolai Podgorny is greeted by President Sadat as he arrives in Cairo to discuss Soviet-Egyptian relations.

May 27—President Sadat and President Podgorny sign a 15-year treaty of friendship and cooperation; the treaty bars interference in their internal affairs. Agreement is also reached for the continuation of Soviet aid to Arab countries for the recovery of "territories occupied by Israel."

May 28—After further meetings with Sadat, President Podgorny leaves Cairo for Moscow.

UNITED KINGDOM

(See also *Intl, E.E.C.*)

Great Britain

May 17—Reporting to the House of Commons on progress in the negotiations, Geoffrey Rippon, chief negotiator for Britain's entry into the Common Market, faces jeers and hostility.

May 24—Prime Minister Edward Heath reports to the House of Commons on his talks last week with French President Georges

Pompidou on British entry into the Common Market.

May 26—Home Secretary Reginald Maudling informs the House of Commons that Britain will double her quota of immigrants of Asian origin from her former East African colonies; the plan will increase the number of such immigrants to about 10,000 per year.

Northern Ireland

May 21—In the 2d successive day of rioting in Belfast, Roman Catholics clash with British soldiers and Protestants.

May 25—22 persons are injured in a bombing incident in Belfast; one of the injured, a British soldier, dies.

UNITED STATES

Civil Rights and Race Relations

May 10—The United States Commission on Civil Rights releases a government-wide study which reports that the government has made some progress in the enforcement of civil rights legislation since the last report was issued 7 months ago; the Department of Housing and Urban Development is criticized in the report for backing down on an earlier commitment to bring about open housing.

May 12—The Civil Service Commission rules that "men only" and "women only" requirements must be removed from most federal jobs.

May 18—President Richard Nixon issues a 112-page response to 60 demands made by 13 Negro members of the House of Representatives in a meeting with the President on March 25; the President rejects some of the demands and agrees with others.

May 21—The Department of Housing and Urban Development publishes guidelines designed to prevent the use of racial and religious designations in newspaper advertisements for the sale or rental of housing; the guidelines, after public hearings, will go into effect in about 2 months.

Two New York City policemen are shot and killed; a note is delivered to *The New York Times* and one to a N.Y. radio station in connection with the shooting earlier in the week of 2 other policemen; the notes threaten more killings of "the armed goons of this racist government."

May 24—Nearly 2,000 National Guardsmen arrive in Chattanooga, Tennessee, following 3 nights of violence and racial disorders.

May 25—Speaking in Mobile Alabama (where he shared the platform with Alabama Governor George Wallace) and in Birmingham, President Nixon calls for unity and cooperation between the races.

The Justice Department makes public new guidelines under which new election laws in 7 southern states will be blocked unless the states can prove that the laws do not foster racial discrimination.

In New Haven, Connecticut, Judge Harold Mulvey dismisses all charges against Bobby G. Seale, chairman of the Black Panther party, and Mrs. Erica Huggins, a local Panther leader, declaring that it would be virtually impossible to select an unbiased jury because of "massive publicity." The trial of Seale and Mrs. Huggins, who had been charged in connection with the kidnapping and murder of Alex Rackley in 1969, ended in a hung jury yesterday.

May 26—In Drew, Mississippi, 3 white men are arrested and charged with the murder of an 18-year-old Negro girl who was shot to death by the occupants of a passing car last night.

Demonstrations

May 2—Police officials in Washington, D.C., order an estimated 30,000 antiwar protesters to disperse.

May 3—About 7,000 antiwar protesters are arrested in Washington, D.C., as their efforts to disrupt the operation of the government fail.

Economy

May 5—The U.S. Steel Corporation announces price increases which will affect about a third of its steel shipments; the

increases will average 6.25 per cent on the affected items.

May 7—The Labor Department reports that the unemployment rate for April rose to 6.1 per cent; the unemployment rate for Negroes rose to 10 per cent from 9.4 per cent in March; the rate for whites remained the same, at 5.6 per cent.

The Census Bureau reports that the number of persons classified as poor in the nation rose to 25.5 million in 1970; this is an increase of 1.2 million over 1969.

May 17—The Commerce Department reports a deficit in the balance of international payments of $5.5 billion for the first quarter of 1971; this is up $2.2 billion over the fourth quarter of 1970.

Foreign Policy

(See also *Intl, Disarmament, Middle East Crisis, Monetary Crisis, War in Indochina; Pakistan; U.S.S.R.*)

May 6—The Senate Foreign Relations Committee unanimously approves a resolution which calls for the suspension of U.S. military aid and arms sales to Pakistan until the civil conflict there ends.

May 10—Secretary of State William Rogers reports to President Nixon on his 2-week tour of the Middle East.

Assistant Secretary of State for Near Eastern and South Asian Affairs Joseph Sisco returns to Washington, D.C., from Egypt where he conferred on the details of an agreement to reopen the Suez Canal.

May 15—The United States Agency for International Development signs an agreement with the Meat and Livestock Economic Community of the Ivory Coast; the agency will lend $6 million for the development of cattle breeding to the Ivory Coast, Niger, Upper Volta, Dahomey and Togo.

May 16—Secretary of State Rogers says that the U.S. Ambassador to the Soviet Union, Jacob Beam, has been instructed to ask officials of the U.S.S.R. to elaborate on a suggestion made by Communist party leader Leonid Brezhnev for mutual troop reductions in Europe.

May 17—Beam confers with U.S.S.R. Foreign Minister Andrei Gromyko on th Brezhnev suggestion.

May 19—A State Department official report that the commander of a Soviet fishin fleet off the East Coast has promised t rectify the situation arising from violation of fishing rights.

The Senate defeats proposals for the re duction of U.S. forces in Europe; a pro posal by Senate majority leader Mik Mansfield (D., Mont.) would have re quired that the forces in Europe be cut i half by the end of 1971, to some 150,00 men.

May 20—The chairman of the U.S. delega tion to the Intelsat negotiations announce that an agreement has been reached unde which the U.S. will relinquish its monopol of the world's satellite communications.

May 26—According to *The New York Times* U.S. Secretary of Defense Melvin Laird attending a conference of the nuclear planning group of NATO in Bavaria, ha told West German Chancellor Willy Brand that the U.S. has not lost interest in settlement of Berlin's problems as a resul of discussions with the Soviet Union o troop reductions and strategic arms limita tion.

May 27—Saudi Arabian King Faisal arrive in Washington, D.C., for an official visi and discusses the Middle East situatio with President Nixon.

Government

(See also *U.S., Labor*)

May 1—In a news conference at San Cle mente, California, President Nixon say that he will do everything possible to im prove the economy. The President de clares that the government will arrest thos antiwar demonstrators in Washington wh break the law.

May 2—In a radio address, the Presiden outlines the plans of his administration t fight crop and animal diseases that plagu U.S. farmers and promises to help then raise their net incomes.

May 5—The President sends proposals t Congress which would establish the federa

legal services program as a new, independent public corporation; the President's objective is to make the program "immune to political pressures."

May 6—Secretary of the Treasury John Connally announces that President Nixon will ask Congress for $250 million in loan guarantees to aid the Lockheed Aircraft Corporation which is facing possible bankruptcy. (See also *U.S., Military.*)

Commissioner Charles Edwards of the Food and Drug Administration announces that the agency is advising the public to stop eating swordfish since the fish have been found to contain levels of mercury that are deemed unsafe.

May 7—Attorney General John Mitchell rejects a plan for the reapportionment of the legislative districts of Virginia on the grounds that the plan discriminates against Negroes.

May 10—Attorney General Mitchell praises the tactics, including mass arrests, which were employed by the police in Washington, D.C., at antiwar demonstrations.

May 11—At a briefing, the President outlines his proposal for an expanded cancer research program; the President proposes an agency that would be independently budgeted and directly responsible to him.

May 12—Postmaster General Winton Blount announces reorganization of the Post Office Department; part of the reorganization calls for the consolidation of 15 postal regions into 5.

U.S. Treasury agents arrest 7 members of the Jewish Defense League, including Rabbi Meir Kahane, and charge them with conspiracy to violate federal gun and bomb regulations.

May 13—Officials in the Environmental Protection Agency announce that the original deadline of July 1 for the reporting of the discharge of 65 types of industrial wastes into waterways by industries has been indefinitely postponed for 51 of the pollutants.

May 16—Temporary postal rate increases go into effect. Under the temporary rates, first class postage for one ounce increases from 6¢ to 8¢; and special delivery rates increase from 45¢ to 60¢.

May 17—The Office of Emergency Preparedness, predicting an electric power crisis this summer, announces a nationwide campaign to conserve electricity.

May 18—Jerris Leonard, head of the Law Enforcement Assistance Administration, announces that regional offices of the agency will be built up and their power increased.

May 19—Leslie Bacon, an antiwar activist, is sent to jail when she refuses to answer questions before a federal grand jury in Seattle, Washington, which is investigating the bombing of the U.S. Capitol on March 1.

By a 58–37 vote, the Senate rejects an $85-million House appropriation bill to revive development of the supersonic transport.

May 21—Stanley Resor resigns after serving 6 years as Secretary of the Army.

May 22—On behalf of the nation, President Nixon accepts the Lyndon Baines Johnson Library at dedication ceremonies in Austin, Texas.

May 27—The Justice Department announces a proposed plan which would set quotas for the production of amphetamines and methamphetamines and tighten distribution and prescription practices; the proposal, if unchallenged, will go into effect in 30 days.

May 28—In Indianapolis, a 4-day conference on cities sponsored by the administration and the North Atlantic Treaty Organization holds its closing session. Vice President Spiro Agnew warns against massive federal aid to cities and calls instead for enactment of revenue-sharing proposals. The conference was designed to seek common solutions to urban problems faced by cities throughout the world.

Labor

May 13—The National Railway Labor Conference, which represents the railroads, announces that an agreement has been reached with the Brotherhood of Locomo-

tive Engineers which will increase wages by about 42 per cent over a 42-month period.

May 14—President Nixon's Construction Industry Stabilization Committee, in its first formal opinion, approves a contract settlement in Little Rock, Arkansas, which calls for an average wage increase of 12 per cent per year over a 3-year period.

May 17—President Nixon asks Congress to pass emergency legislation to end a strike by the Brotherhood of Railroad Signalmen that shut down almost all of the nation's railroads today.

May 18—Congress approves legislation which orders the railroad signalmen to return to work, places a moratorium on signalman strikes until October 1, and provides for an interim wage increase of 13.5 per cent; the legislation is signed by the President.

May 31—The United Steelworkers of America announces that agreements have been reached with 4 major aluminum companies to increase wages about 31 per cent over a 3-year period.

Military

May 7—The Defense Department announces that on June 7 it will put into effect a contract with Lockheed Aircraft Corporation under which the government will begin to pay out $200 million to maintain production of 81 C-5A transport planes; when the last of the planes is produced, Lockheed will owe the government $100 million.

May 13—The Army nominates 80 colonels for promotion to the rank of brigadier general; among the 80 are 3 Negroes.

May 19—Secretary of the Army Stanley Resor announces the demotion of Major General Samuel Koster to the rank of Brigadier General for his failure to conduct an adequate investigation into the slaying by U.S. soldiers of civilians at Mylai, South Vietnam, in 1968; Koster and Brigadier General George Young are stripped of their Distinguished Service Medals.

May 29—In an address at the United States Military Academy, President Nixon urges the cadets to uphold the honor of the military despite criticism of their tradition.

Defense Department officials say that a program to test every member of the armed forces for drug addiction before discharge into civilian life will begin in about 60 days.

Politics

May 13—The Democratic Policy Council proposes the complete federalization of the nation's welfare program over the next 3 years and the immediate enactment of a family assistance program.

May 27—Senator Robert Taft, Jr., of Ohio announces that he will run as a favorite-son candidate in the primary for the Republican presidential nomination; Taft says that he will be "standing in for the renomination of President Nixon."

Supreme Court

May 3—In a 6-to-3 ruling, the Court decides that states do not violate the Constitution when they permit juries which have found a defendant guilty to determine whether the death penalty will be imposed without hearing further evidence; and that the "untrammeled discretion" given to juries to decide life or death penalties in case of capital crimes is not unconstitutional.

May 17—The Court, in a 5-to-4 ruling, decides that state "hit and run" laws which require motorists involved in accidents to stop and give their names and addresses are constitutional.

May 24—In a unanimous decision, the Court rules unconstitutional state laws that revoke the drivers' licenses of uninsured motorists involved in accidents whether or not they are at fault.

VIETNAM, REPUBLIC OF (South)

(See also *Intl, War in Indochina*)

May 30—Vice President Nguyen Cao Ky, at a news conference, announces that he will be a candidate for President in the October elections.

YUGOSLAVIA

May 8—President Tito, in a speech, calls on the country's leaders for unity and on ordinary citizens for economic discipline.

AVAILABLE FROM CURRENT HISTORY

Academic Year 1971-1972

- ☐ The American System of Justice (6/71)
- ☐ American Justice at Work (7/71)
- ☐ Improving Justice in America (8/71)
- ☐ Communist China, 1971 (9/71)
- ☐ The Soviet Union, 1971 (10/71)
- ☐ Welfare and the New American Federalism (11/71)
- ☐ Southeast Asia, 1971 (12/71)
- ☐ The Middle East, 1972 (1/72)
- ☐ Latin America, 1972 (2/72)
- ☐ Australia and New Zealand (3/72)
- ☐ Canada (4/72)
- ☐ Germany (5/72)

Still Available

- ☐ The American Cities (12/68)
- ☐ U.S. Military Commitments in Latin America (6/69)
- ☐ U.S. Military Commitments in Europe and the Middle East (7/69)
- ☐ U.S. Military Commitments in Asia (8/69)
- ☐ Black America (11/69)
- ☐ Latin America (2/70)
- ☐ Africa (3/70)
- ☐ The Nations of the Pacific (4/70)
- ☐ The Atlantic Community (5/70)
- ☐ U.S. Resources: A Tally Sheet (6/70)
- ☐ America's Polluted Environment (7/70)
- ☐ Options for a Cleaner America (8/70)
- ☐ Mainland China, 1970 (9/70)
- ☐ The Soviet Union, 1970 (10/70)
- ☐ Urban America (11/70)
- ☐ Southeast Asia, 1970 (12/70)
- ☐ The Middle East, 1971 (1/71)
- ☐ Latin America, 1971 (2/71)
- ☐ Africa, 1971 (3/71)
- ☐ Japan, 1971 (4/71)
- ☐ East Europe, 1971 (5/71)

CURRENT HISTORY ANNUAL, 1971

. . . A day-by-day, country-by-country review of the events of 1970, adapted from *Current History's* "Month in Review," is indexed in a single volume as a service to our readers. It also contains the index to twelve 1970 issues of *Current History*.

CURRENT HISTORY ANNUAL, 1970

. . . Still available.

CURRENT HISTORY BINDER

. . . A sturdy, hard-cover binder at a reasonable cost to protect *Current History* for permanent reference. The easy-to-use binder holds 12 issues securely in place over flexible steel rods. Each issue of *Current History* can be placed in the binder every month, to preserve your file of this handbook of world affairs. A thirteenth rod is included to secure the *Current History Annual*.

ANNUAL SUBSCRIPTION: 1 year, $9.50; 2 years, $18.50.
NINE-MONTH SUBSCRIPTION: $7.95
SEVEN-MONTH STUDENT SUBSCRIPTION: $5.95.
SPECIFIC ISSUE PRICE: $1.00 per copy; 10 or more of the same issue, 65¢ per copy.
CURRENT HISTORY ANNUAL PRICE: $2.45 **BINDER PRICE:** $3.50

CURRENT HISTORY • 4225 Main Street • Philadelphia, Pa. 19127

☐ Copies of Current History Annual, 1971, at $2.45 each. ☐ Copies of Current History Annual, 1970, at $1.95 each. ☐ Current History Binders at $3.50 each.

☐ Please send me the issues I have indicated above in the quantities I have marked.

☐ Send me ..... 9-month subscriptions. ☐ Send me ..... 7-month subscriptions.

SPECIAL SUBSCRIPTION OFFER: your choice of 3 free issues.

☐ 1 year $9.50, plus 3 free issues marked above.

☐ 2 years $18.50, plus 3 free issues marked above.

Name .....

Address .....

City ..... State ..... Zip Code .....

☐ Check enclosed. ☐ Bill me. Add 50¢ for Canada; $1.00 for foreign.

All these offers are good only on orders mailed directly to the published.
Specific issue price based on a single mailing address for all issues ordered.

7-71-4

Current History... is a monthly magazine offering objective scho
discussions of vital areas and topics relating to national and i
national affairs. Each issue focuses on a particular topic an
cludes:

7 or 8 articles, exploring the political, economic and social aspec
the problem area. The articles are written by leading histor
economists, diplomats and governmental specialists.

Current documents, often complete, original texts of important tre
agreements, speeches and diplomatic notes, to provide docume
records.

Book reviews on new books in the fields of history, international affairs, economics and social sciences.

Charts and maps to support and illustrate the text.

The "Month in Review," a day-by-day record of the month's news—the only who, what, where and when index published monthly in the U.S.

Current History Annual 1971 covers the events of 1970 country by country and day by day, from Afghanistan to Zambia. A person and subjects index makes it easy to identify names and to find the dates of the important events of the year. Students, teachers, researchers and other concerned citizens have discovered that the Current History Annual is a useful and inexpensive review of the year's events. Libraries are pleased with this brief key to the world's news.

Current History Binder is an inexpensive, yet sturdy hard cover binder in which 12 issues and the Annual can be easily inserted and protected for permanent reference.